# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1886.**

No. ~~197~~ 6

JESSE P. FARLEY, APPELLANT,

*vs.*

NORMAN W. KITTSON, JAMES J. HILL, AND THE ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

**FILED FEBRUARY 27, 1883.**

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1 United States Circuit Court, District of Minnesota.

JESSE P. FARLEY
*vs.*
NORMAN W. KITTSON, JAMES J. HILL, and THE SAINT PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY.

Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota, of the June term of said court, held in the city of Saint Paul, in said district, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the one hundred and sixth year.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that on this thirteenth day of November, A. D. 1880, came the complainant above named, by Messrs. Gilman & Clough, their solicitors and of counsel, and filed in the clerk's office of said court his bill of complaint in the words and figures following, to wit:

2 In the United States Circuit Court for the District of Minnesota.

To the honorable judges of said court:

Your orator, Jesse P. Farley, of Dubuque, Iowa, and who is a citizen of the State of Iowa, brings this his bill against Norman W. Kittson and James J. Hill, of St. Paul, Minnesota, and who are citizens of the State of Minnesota, and The St. Paul, Minneapolis and Manitoba Railway Company, a corporation created, organized, and existing under the laws of the State of Minnesota and a citizen of said State, and thereupon your orator complains and says:

I.

That in the summer of 1876 he and the said defendants, Norman W. Kittson and James J. Hill, mutually agreed by and between themselves, each with the other, that they would jointly undertake for their joint, mutual, and equal interest, benefit, advantage, and profit to acquire, by purchase or contract, all the bonds possible to be obtained of the First Division of the St. Paul and Pacific Railroad Company and of the St. Paul and Pacific Railroad Company, corporations created and existing under the laws of the State of
3 Minnesota and owning lines of railroad and other property in said State, which bonds had theretofore been issued by said respective companies, and were outstanding and for sale by the holders thereof at a large discount, and were secured by mortgages upon the lines of road and other property of said companies, and which mortgages were then in process of foreclosure in five several suits in courts in said State for default in the payment of the interest upon said bonds.

That the understanding, object, purpose, and agreement of said parties in acquiring said bonds was to become the purchasers of said

lines of railroad and other mortgaged property when offered for sale under decrees for the foreclosure of said mortgages and to turn in and use said bonds in payment, or part payment, therefor, and thereby, through and by means of said bonds, acquire said lines of railroad and other property.

That the said defendant Kittson represented that he could procure from one Donald A. Smith and other capitalists in Canada the necessary funds that would be required in said undertaking.

4 And it was further agreed by and between your orator and said Kittson and Hill that if it should become necessary to do so, the said Kittson might use or give to said Smith and others furnishing the required funds an interest with them in said purchases and enterprise, but that the interest not so used or given should be retained and held for the mutual joint and equal benefit of your orator and said Kittson and Hill.

It was also then and there further agreed by and between your orator and said Kittson and Hill that the details of the negotiations for procuring the necessary fund and for the purchase of said bonds should be principally conducted and managed by the said Kittson and Hill and such person or persons as an interest in said enterprise should be given to for furnishing funds therefor, and that your orator should furnish such facts, information, and advice and render such aid and assistance therein from time to time as should be required of him. That your orator had knowledge not possessed by any of the other parties as to the whereabouts and situation of said bonds,

5 the rated value thereof by the holders, the mode whereby and the channel through which the same could be reached and procured; also in respect to the situation, amount, character, value of the lines of railroad and property mortgaged to secure said bonds, and in respect to the pending suits for the foreclosure of said mortgages, and that the services of your orator in respect to all of said matters and his co-operation were indispensable to the success of said enterprise.

## II.

And your orator further alleges that thereupon the said defendant Kittson made arrangements with and procured the said Donald A. Smith, in conjunction with one George Stephen, to join in said enterprise and furnish funds to purchase or secure the control and use of said bonds, as far as found practicable, and to carry out said undertaking; and in consideration thereof agreed to give the said Smith and Stephen a certain fractional interest in said enterprise, but of the precise terms of the agreement with them as to the interest they were to have in said enterprise your orator is not definitely

6 advised, but on information and belief alleges the same to have been one-half; the balance, however, not so agreed to be given to the said Smith and Stevens belonged to your orator and the said Kittson and Hill, in equal proportions, under the said agreement between them.

III.

And your orator further alleges that thereupon, and in 1877, active negotiations were opened and carried on by the said Smith, Stephen, Kittson, Hill, and your orator for the purchase of said bonds, in pursuance of the aforesaid understandings and agreements appertaining to said enterprise, and were continued down into the month of June, 1879, and, as a result thereof, they purchased and secured a large quantity of said bonds, amounting in the aggregate, at their face value and overdue interest, to over $25,000,000; that said purchases were made by and in the name of said Smith, Stephen, Kittson, and Hill, but for the purpose and with a view to their use in the purchase of said lines of railroad and other mortgaged property when offered for sale under foreclosure decrees, and under and in pursuance of the agreements and understand-
7 ings between your orator and the said Kittson and Hill, hereinbefore stated in respect thereto; that throughout said negotiations for the purchase of said bonds, and in the purchases thereof, your orator was continuously called upon by the said Kittson and Hill for facts and information, advice and co-operation in respect thereto, and at their request furnished and rendered the same pursuant to the aforesaid agreements and understandings between them; and that said negotiations were only successful through and by means of the advice and co-operation of your orator and the facts and information peculiarly within his knowledge as aforesaid, and imparted by him to the said Kittson and Hill at their request, under said understandings and agreements between them as aforesaid.

That most of said purchases of said bonds were made under an agreement with the holders thereof, whereby payment therefor was not to be made until decrees of foreclosure of the mortgages given to secure the same should be rendered, and the lines of
8 railroad and other property sold under such decrees and acquired by said purchasers, and a new issue of bonds made, secured by a new mortgage on the same property, whereupon it was optional with the seller of the bonds to demand cash at the agreed purchase-price, or to take the new bonds of the newly to be organized company.

That it was the understanding on the part of all said parties that, as soon as said lines of railroad and other mortgaged property should be acquired by them under said decretal sales, a new issue of bonds should be made by them, or by the company to be organized by them, to take, hold manage, and operate said property, and secured by a new mortgage upon said property of sufficient amount to cover and defray the cost of said bonds and all expenses connected with the carrying out of said enterprise.

IV.

And your orator further alleges that the said defendant, The St. Paul, Minneapolis and Manitoba Railway Company, is a corporation

organized in May, 1879, under the laws of the State of Minne-
9 sota, by the said Smith, Stephen, Kittson, and Hill, for the purpose of acquiring, taking, holding, operating, and managing said lines of railroad and other mortgaged property for the use and benefit of the said parties interested in the purchase of said bonds as aforesaid, when said lines of railroad and other mortgaged property should be acquired by or for them, or offered for sale under said foreclosure decrees; and that the said Smith, Stephen, Kittson, and Hill are directors and officers of said company, and have the control and management of the same.

V.

Your orator further alleges that in the months of March and April, 1879, foreclosure decrees were duly had, taken, and entered in said pending suits for the foreclosure of said mortgages given to secure said bonds, directing the sale at public auction of the said lines of railroad and other property of the said mortgagor railroad companies covered by said mortgages; which decrees severally provided, among other things, that, in payment for the mortgaged property so ordered
10 to be sold, the said mortgage bonds and overdue coupons should be taken as cash for such an amount as would equal the dividend to which they would be finally entitled *pro rata* under the decrees, and that in the months of May and June, 1879, sales were duly had and made of said lines of railroad and other mortgaged property, under and pursuant to said foreclosure decrees, and the same were all bid in, purchased, or acquired by the said St. Paul, Minneapolis and Manitoba Railway Company, for the use and benefit of the aforesaid parties in interest in the purchase of said bonds as aforesaid, including your orator, by the direction and procurement of the said Kittson, Hill, Smith, and Stephen, and that all of said bonds which had been purchased as aforesaid were turned in and used in payment of said lines of railroad and property by the said Kittson, Hill, Smith, and Stephen, and that the said railway company paid nothing in the purchase of said railroads and property, but took the same without consideration, except the consideration fur-
11 nished and provided by your orator and said Kittson, Hill, Smith, and Stevens, and which consideration so furnished and provided, aside from said bonds as aforesaid, was furnished by the said Smith and Stephen, pursuant to the aforesaid arrangement with them for joining in said enterprise.

That over five hundred miles of railroad in said State of Minnesota, with the equipments appertaining thereto, and over one million acres of land in said State and much other valuable property, and in all worth over $15,000,000, were thereby acquired and become vested in said defendant railway company for the use and benefit of your orator and the said Kittson, Hill, Smith, and Stephen, in proportion to their several and respective interest in said bonds so purchased as aforesaid, subject only to the advances made and obligations incurred in connection with said enterprise.

At the time of the said purchase of said lines of railroad and other

mortgaged property, and at the time of the use of said bonds
12 as aforesaid in payment therefor, and at the time said property was vested in said defendant railway company, the said Smith and Stephen and the said railway company had notice and knowledge that your orator was jointly and equally interested in said bonds so purchased as aforesaid, and in said undertaking and enterprise, with the said Kittson and Hill.

VI.

Your orator further states that on the 21st day of June, 1879, the said defendant railway company, by the direction of the said Stephen, Smith, Kittson, and Hill, issued and negotiated its bonds to the amount of $8,000,000, payable in 1909, with interest payable half yearly at seven per cent. per annum, and at the same date executed a mortgage or trust deed to secure said bonds on said lines of railroad, lands, and all other property of said company, and that said bonds and the proceeds thereof were used so far as was necessary to pay the cost of said bonds so purchased as aforesaid and all other expenses incurred or incident to said enterprise; and that
13 said $8,000,000 of bonds and the proceeds thereof were more than sufficient for said purposes.

VII.

That since June 15th, 1879, said defendant railway company, under the control and management of said Smith, Stephen, Kittson, and Hill, has been in the possession of said lines of railroad, lands, and other property, and has received from the earnings thereof over $500,000 over and above operating expenses and interest on said $8,000,000 mortgage, and has also sold large quantities of lands and other property acquired as aforesaid and realized therefrom large sums of money, but the amount thereof your orator is unable to state, and has also made expenditures in connection with said property, but the amount thereof is unknown to your orator.

VIII.

The capital stock of said defendant railway company is $15,000,000, divided into shares of $100 each, which stock now represents
14 the said property so acquired by the said railway company, and constitutes, in part, the profits arising and resulting from said enterprise; but that, aside from said stock, other profits, amounting to many hundred thousand dollars, have been realized from said enterprise through the agency of said railway company and otherwise, and have been divided between said Smith, Stephen, Kittson, and Hill.

That a large amount of the said capital stock of said railway company has been issued by said railway company and divided between said Smith, Stephen, Kittson, and Hill, and that the said railway company has delivered to the said Kittson and Hill fifty-seven thousand six hundred and forty-six shares thereof—to the said Kittson, one-half thereof in his own individual name and right, and to the

said Hill, one-half thereof in his own individual name and right—being a portion and part thereof to which your orator and the said Kittson and Hill are entitled under and pursuant to the said arrangement made with said Smith and Stephen in connection with said enterprise; and that said railway company has neglected and refused, and still neglects and refuses, to deliver to your orator any part of said stock so issued, and that said stock is worth par
15 value.

IX.

Your orator further shows that the said defendants, Kittson and Hill, never denied, disputed, or questioned, but always admitted and recognized, the right of your orator, under the said agreement and understanding between them, to an equal share and interest in said enterprise and in the results and avails thereof with them, the said Kittson and Hill, until after the organization of said defendant railway company in May, 1879, an- then, at first, only intimated or suggested to your orator that his share or interest ought not to be equal to theirs, as they had, they claimed, been required to advance some money in carrying out said enterprise.

But now, so it is, may it please your honors, that the said Norman W. Kittson and James J. Hill, colluding and confederating with each other and with the said defendant railway company to wrong and defraud your orator, give out and pretend that he has no rights or interest in said enterprise or in the benefits, results, avails, or profits thereof, and
16 refuse to deliver or turn over to him any of the said capital stock in said railway company so received by them, or account to him therefor, and refuse to pay over or account to him for any of the results, avails, or profits of said enterprise received or realized by them, and refuse to render him any statement or account appertaining to said enterprise, and have thus far, and claim that they will in the future wholly appropriate to their own use, to the entire exclusion of your orator, all the results, avails, and profits of said enterprise and undertaking, to which the said Smith and Stephen are not entitled under the aforesaid agreement made with them; and the said defendant railway company, conspiring with the said Kittson and Hill to cheat and defraud your orator, refuses to account to him for his interest in the said property and effects, and every part thereof, which have come to its possession and been appropriated by it, as aforesaid, and has refused and still refuses to issue to him his proportion or any of its capital stock, and
17 has wrongfully and fraudulently issued the same in part to the said Kittson and Hill, and refused to account to your orator for any of the profits accruing from said lines of railroad, lands, and other property, but persists in ignoring and disregarding the rights of your orator in the premises.

All which actings, doings, and pretences are contrary to equity and good conscience, and tend to manifest wrong and injury of your orator in the premises. In consideration whereof, and forasmuch as your orator can only have adequate relief in the premises in this

honorable court, where matters of this nature are properly cognizable and relievable.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed for, and may, to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the matters aforesaid (but the oath of said defendants thereto and of each of them is
18 hereby waived) as fully and particularly as if the same were here repeated, and they and each of them distinctly interrogated in respect thereto, and more especially that the said defendants, Kittson and Hill, may answer and set forth the terms and conditions of the said agreement and understanding made or had with the said Smith and Stephen in respect to said enterprise and undertaking, and the amount of said bonds purchased or acquired, and the cost thereof, and all expenses connected with and incident to said enterprise, and the amount of money, if any, actually furnished by them, and when, in connection with said enterprise, and the amount furnished by said Smith and Stephen, and when and how, and where, and for what all moneys so furnished were paid out, and when, how, and from what source the same have been repaid, and what dividend or profits in money, bonds, stocks, and other effects have been made, turned over to, or received by them, the said Kittson and Hill, or either of them, resulting from or appertaining to said enterprise; and that the said defendant railway company may also more especially set forth what moneys, bonds, stocks, and other effects have been paid or turned over by it to or for the said defendants,
19 Kittson and Hill, and upon what consideration, and also what property is now held by it, and what lands and other property have been sold by it, and when, and to whom, and upon what consideration; and also what use has been made of the bonds and of the proceeds thereof which have been issued by said railway company and secured by mortgage upon its property, and that an account may be taken by and under the order and direction of this honorable court of all moneys paid out and of all property and effects acquired by, under, and pursuant to said undertaking and enterprise, and of the disposition made thereof, and of the property acquired by said defendant railway company, and of the disposition made of the bonds, or proceeds thereof, which have been issued by said defendant railway company, and of the moneys, bonds, stocks, and other effects which have been received by said defendants, Kittson and Hill, or either of them, as profits, avails, or results arising or accruing from said enterprise and undertaking, and of all other matters appertaining to said enterprise; and that
20 the said Kittson and Hill be ordered, adjudged, and decreed to pay and turn over to your orator one-third of all moneys, bonds, stock, and effects that shall be found to have been received by them resulting or accruing from said enterprise and undertaking; and that your orator be decreed and adjudged to be entitled to an equal interest with said Kittson and Hill in said enterprise and undertaking, and in the benefits, avails, and profits resulting

therefrom; and that said defendant railway company be decreed and adjudged to issue to your orator his just and due proportion of its capital stock, and to account to your orator for his proportion and share of the property which has come to its possession, and for the avails, results, and profits thereof, and to recognize the rights of your orator in the stock and property of said company as equal to the said Kittson and Hill; and that your orator may have such other and further relief in the premises as the nature of his case may require and to this honorable court shall seem meet:

21 And may it please your honors to grant unto your orator a writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the said Norman W. Kittson, James J. Hill, and The Saint Paul, Minneapolis and Manitoba Railway Company, defendants, commanding them, and each of them, on a day certain therein to be named, and under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises, and to stand to, perform, and abide such further order, direction, and decree as may be made against them.

GILMAN & CLOUGH,
GRIFFITH & KNIGHT, AND
DAVIS, O'BRIEN & WILSON,
*Solicitors for Plaintiff.*

J. M. GILMAN &
C. K. DAVIS,
*Of Counsel.*

And thereupon a writ of subpœna was duly issued out of said court, and under the seal thereof, duly tested, and in the words and figures following, to wit:

22 UNITED STATES OF AMERICA, }
*District of Minnesota,* } *ss:*.

The President of the United States of America to Norman W. Kittson, James J. Hill, The Saint Paul, Minneapolis and Manitoba Railway Company, Greeting:

You are hereby commanded to appear before our judges of our circuit court of the United States of America for the district of Minnesota, at Saint Paul, in said district, on the first Monday in the month of December next, to answer the bill of complaint of Jesse P. Farley, this day filed in the clerk's office of said court, in said Saint Paul, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the district of Minnesota to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Saint Paul aforesaid, this 13th day of November, in the year of our Lord one thousand eight hundred and eighty, and of our Independence the one hundred and fifth year.

[SEAL.] H. E. MANN, *Clerk.*

*Memorandum.*

The within-named defendants are notified that unless they enter their appearance in the clerk's office of said court, at Saint Paul aforesaid, on or before the day to which this writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

[SEAL.] H. E. MANN, *Clerk.*

GILMAN & CLOUGH,
GRIFFITH & KNIGHT,
DAVIS, O'BRIEN & WILSON,
*Plaintiff's Solicitor.*

23 Which subpœna was afterwards duly returned to our said clerk's office endorsed by the marshal of the United States for the district of Minnesota in the words and figures following, to wit:

24 UNITED STATES OF AMERICA, } ss:
*District of Minnesota,* }

I hereby certify that I served the annexed chancery subpœna on the therein-named defendant, Norman W. Kittson, personally, by handing to and leaving with him a true copy thereof, at St. Paul, in said district, on the 13th day of November, 188–.

R. N. McLAREN,
*U. S. Marshal,*
By HENRY MORRIS, *Deputy.*

25 UNITED STATES OF AMERICA, } ss:
*District of Minnesota,* }

I hereby certify that I served the annexed chancery subpœna on the therein-named defendant, James J. Hill, by handing to and leaving a true copy thereof for him with Mamie Hill, daughter of James J. Hill, an adult person, then a member of and resident in the family, at the usual place of abode of the said James J. Hill, at St. Paul, in said district, on the 13th day of November, 1880.

R. N. McLAREN,
*U. S. Marshal,*
By H. MORRIS, *Deputy.*

26 UNITED STATES OF AMERICA, } ss:
*District of Minnesota,* }

I hereby certify that I served the annexed chancery subpœna on the therein-named defendant, The St. Paul, Minneapolis & Manitoba Railway Company, personally, by handing to and leaving with Edward Sawyer, secretary & treasurer of said Co., a true copy thereof at St. Paul, in said district, on the 26th day of November, 1880.

R. N. McLAREN,
*U. S. Marshal,*
By H. MORRIS, *Deputy.*

Marshal's fees & expn., $6.96.

27 And afterwards, to wit, at rules, held in the clerk's office of said court on the 6th day of December, A. D. 1880, the following proceeding, among others, was had, to wit:

JESSE P. FARLEY *vs.* NORMAN W. KITTSON *et al.*

And now come the defendants, Kittson and Hill, by Geo. B. Young, Esq., their solicitor, on whose motion it is ordered that the appearance of said defendants be, and the same is hereby, entered.

And afterwards, to wit, at rules, held in the clerk's office of said court on the third day of January, A. D. 1881, the following proceeding, among others, was had, to wit:

JESSE P. FARLEY *vs.* NORMAN W. KITTSON *et al.*

And now comes the defendant railway company, by Messrs. Bigelow, Flandrau, & Clark, its solicitors, on whose motion it is ordered that the appearance of said defendant be, and the same is hereby, entered.

28 And afterwards, to wit, on the third day of January, A. D. 1881, came the defendants, Kittson and Hill, by Geo. B. Young, Esq., their attorney, and filed their demurrer to the plaintiff's bill of complaint, which is in the words and figures following, to wit:

29 United States Circuit Court, District of Minnesota.

JESSE P. FARLEY, Plaintiff,

*vs.*

NORMAN W. KITTSON and JAMES J. HILL, impleaded with the St. Paul, Minneapolis & Manitoba Railway Co., Defendants.

The demurrer of Norman W. Kittson and James J. Hill, two of the defendants above named, to the bill of complaint of Jesse P. Farley, complainant.

These defendants, respectively, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show that the said complainant hath not, in and by his said bill, made or stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against these defendants.

30 Wherefore these defendants demand the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and pray to be hence dismissed, with his reasonable costs in this behalf sustained.

GEO. B. YOUNG,
R. B. GALUSHA,
*Solicitors & Counsel for said Defendants.*

We certify that in our opinion the foregoing demurrer is well founded in point of law.

GEO. B. YOUNG,
R. B. GALUSHA,
*Counsel for Def'ts.*

STATE OF MINNESOTA, *County of Ramsey:*

James J. Hill, being duly sworn, says: That the foregoing demurrer is not interposed for delay.

JAS. J. HILL.

Subscribed & sworn to before me, this third day of January, 1881.

31 [SEAL.] E. A. C. HATCH,
*Notary Public, Ramsey Co., Minn.*

STATE OF MINNESOTA, *County of Ramsey:*

Norman W. Kittson, being duly sworn, says: That the foregoing demurrer is not interposed for delay.

N. W. KITTSON.

Subscribed & sworn to before me, Jan'y 3rd, 1881.

[SEAL.] C. H. MANSHIP,
*Notary Public, Minnesota.*

32 And afterwards, to wit, at rules, held in the clerk's office of said court on the second day of February, 1881, the following proceeding, among others, was had, to wit:

JESSE P. FARLEY *vs.* NORMAN W. KITTSON *et al.*

Upon motion of Messrs. Gilman & Clough, plaintiff's solicitors, it is ordered that the demurrer of defendants Kittson & Hill be, and they are hereby, set down for hearing at the term of court to be held on the third Monday, being the 20th day, of June, 1881, at the opening of court on that day, or as soon thereafter as counsel can be heard.

And afterwards, to wit, on the seventh day of February, A. D. 1881, came the defendant, The St. Paul, Minneapolis & Manitoba Railway Co., by its attorneys, and filed in the clerk's office of said court its demurrer to the plaintiff's bill of complaint, which is in the words and figures following, to wit:

33 Circuit Court of the United States for the District of Minnesota. In Equity.

DISTRICT OF MINNESOTA, *ss:*

The demurrer of the Saint Paul, Minneapolis and Manitoba Railway Company, one of the defendants, to the bill of complaint of Jesse P. Farley, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill

contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill, and for cause of demurrer showeth:

That the said complainant hath not in and by his said bill made or stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

Wherefore and for divers other good causes of demurrer appearing in the said bill this defendant doth demur thereto, and demands the judgment of this court whether it shall be com-
34 pelled to make any further or other answer to the said bill or any of the matters and things therein contained, and humbly prays to be hence dismissed, with its costs and charges in this behalf most wrongfully sustained.

BIGELOW, FLANDRAU & CLARK,
*Solicitors for Def't, The St. Paul, Minneapolis & Manitoba Railway Company.*

H. R. BIGELOW,
*Of Counsel.*

UNITED STATES OF AMERICA:

Circuit Court of the United States for the District of Minnesota.

I, Horace R. Bigelow, of St. Paul, Minnesota, a counsellor of this court, do hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

H. R. BIGELOW.

UNITED STATES OF AMERICA, } *ss:*
*District of Minnesota,* }

Edward Sawyer, of St. Paul, in said district, being duly
35 sworn, says: He is the secretary of the Saint Paul, Minneapolis and Manitoba Railway Company, defendant, named in the foregoing demurrer, and that said demurrer is not interposed for delay.

EDW'D SAWYER.

Subscribed and sworn to before me, this 4th day of February, A. D. 1881.

[SEAL.] GEO. C. SQUIRES,
*Notary Public, Minn.*

36 And afterwards, to wit, at rules, held in the clerk's office of said court on the 28th day of February, A. D. 1881, the following proceeding, among others, was had, to wit:

JESSE P. FARLEY *vs.* NORMAN W. KITTSON *et al.*

Upon motion of Messrs. Gilman & Clough & Griffith & Knight, plaintiff's solicitors, it is ordered that the demurrer of the defendant railway Co. be, and it is hereby, set down for hearing on the third Monday, being the 20th day, of June, 1881, at the opening of court on that day, or as soon thereafter as counsel can be heard.

37 And afterwards, to wit, at a stated term of said court, begun and held in the city of St. Paul, in said district, on the third Monday in June, 1881, being the 20th day thereof, the following proceeding, among others, was had, to wit:

JESSE P. FARLEY *vs.* NORMAN W. KITTSON *et al.*

On motion of Geo. B. Young, Esq., solicitor for defendants, Kittson & Hill, it is ordered that said defendants have leave to withdraw their demurrers and file pleas to the plaintiff's bill.

And afterwards, to wit, at a stated term of said court, begun and held in the city of St. Paul, in said district, on the third Monday, being the 20th day, of June, A. D. 1881, and on the first day of July, 1881, the following proceeding, among others, was had, to wit:

JESSE P. FARLEY *vs.* NORMAN W. KITTSON *et al.*

38 Pursuant to the stipulation of the parties, by their solicitors, it is ordered that the defendants, Norman W. Kittson and James J. Hill, have leave to withdraw their demurrer to the plaintiff's bill and substitute therefor a plea, and that the said plea be, and it is hereby, set down for hearing with the demurrer of the defendant, The St. Paul, Minneapolis & Manitoba Railway Co., at this term of court.

And afterwards, to wit, on the 2d day of July, A. D. 1881, came the defendants, Kittson & Hill, by their solicitor, and filed in the clerk's office of said court their plea to the plaintiff's bill of complaint, in the words and figures following, to wit:

39 In the Circuit Court of the United States for the District of Minnesota. In Equity.

JESSE P. FARLEY

*vs.*

NORMAN W. KITTSON, JAMES J. HILL, and THE ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY.

The plea of Norman W. Kittson and James J. Hill, two of the above-named defendants, to the bill of complaint of Jesse P. Farley, complainant.

These defendants, and each of them, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill of complaint mentioned and contained to be true in such manner and form as the same are therein set forth and alleged, for plea to the whole of said bill say:

That the bonds of the St. Paul & Pacific Railroad Company (which will be hereafter styled the St. Paul Company), mentioned in said bill, were bonds of an issue of twelve hundred thousand dollars, made and executed by said St. Paul Company, bearing date the second day of June, 1862, and which bonds were secured by

40 a mortgage or trust deed of the same date, made & executed by said St. Paul Company to Edmund Rice, Horace Thomp-

son, and Samuel J. Tilden, as trustees, by which trust deed or mortgage the said St. Paul Company conveyed to said trustees all that portion of its line of railroad extending from the city of St. Paul, via St. Anthony, to the town of Watab, on the Mississippi river, together with all structures, grounds, equipment, and rolling-stock belonging to said portion of its line so conveyed, and all its rights, privileges, and franchises appertaining to said line of road so conveyed, including the franchise to be a corporation, then held or which should be acquired by said company, and also the lands granted by the Congress of the United States to aid in the construction of said road, and which then had been or should thereafter be acquired by said company under the act of Congress making said grant; that in the summer of 1876 the said Samuel J. Tilden resigned his office of trustee under said trust deed or mortgage, and one John S. Kennedy was, pursuant to the terms thereof, duly appointed trustee in his place.

41 That the bonds of the First Division of the St. Paul and Pacific Railroad Company (which will be hereafter styled the First Division Company), mentioned in said bill, were bonds of the following issues, and were all made and executed by said company:

1. An issue of two million eight hundred thousand dollars, the bonds of which issue bore date and were issued on the 1st day of September, 1865, and were payable, with interest, semi-annually, at the rate of seven per cent., on the 1st day of December, 1895; which said bonds were secured by a mortgage or trust deed made by said First Division Company (which had succeeded said St. Paul Company in the ownership of all the property embraced in the $1,200,000 mortgage or trust deed hereinbefore mentioned) to George L. Baker, George T. M. Davis, and the said Horace Thompson, as trustees, by which mortgage or trust deed the said First Division Company did convey to said trustees, in trust to same — the payment of the principal and interest of said bonds, all the property described in said mortgage of June 2, 1862, and also certain other lands, to the amount of four sections per mile, which had been granted

42 by Congress to aid in the construction of said line, which said mortgage trust deed bore date the 1st day of September, 1865.

2. An issue of bonds to the amount of three millions of dollars, bearing date on the 1st of March, 1864, payable May 1, 1894, with interest, payable semi-annually on the first days of May and November in each year, at the rate of seven per cent. per annum; which said bonds were secured by a mortgage or trust deed bearing date March 1st, 1864, made by said First Division Company to Edmund Rice, Horace Thompson, and Samuel J. Tilden aforesaid, upon that part of its line of railroad know- as its main line, extending from St. Anthony aforesaid to a point 150 miles westerly therefrom, and the appurtenances, equipment, and corporate franchises pertaining thereunto, then held or which might be thereafter acquired by said First Division Company, and also the land grant of six sections per mile with which said company was endowed by act of Congress to aid in the construction of said line.

3. An issue of bonds to the amount of $6,000,000, bearing date July 1, 1868, and payable July 1, 1898, with semi-annual
43 interest at seven per cent. per annum, payable on the 1st day of May and November in each year, to secure the payment of which bonds & interest the said First Division Company did, by a trust deed or mortgage, bearing date said July 1, 1868, convey unto the said George L. Becker, Horace Thompson, and Samuel J. Tilden, trustees, its entire main line, extending from St. Anthony aforesaid to Breckenridge, a distance of 207 miles (and including 150 miles embraced in said $3,000,000 mortgage), together with all appurtenances, equipments, corporate franchises, including the franchise to be a corporation, belonging or anywise appertaining to said main line, and also all lands granted by Congress to aid in the construction thereof, except the lands contained in said $3,000,000 mortgage.

4. An issue of bonds to the amount of fifteen million dollars, made and issued by said First Division Company, bearing date the first day of April, 1871, and payable thirty years thereafter, with interest at seven per cent. per annum, payable semi-annually on the 1st days of January and July in each year, the payment of the prin-
44 cipal and interest of which bonds was secured by a mortgage or trust deed bearing date April 1, 1871, made by said St. Paul Company to the said George L. Becker and Horace Thompson and one Wm. G. Mourhead, as trustees, whereby the said St. Paul Company conveyed to said trustees its lines of railroad extending from St. Cloud to St. Vincent, in Minnesota, a distance of about 310 miles, and from Watab aforesaid to Brainard, in said State, a distance of about sixty miles, together with the equipments, appurtenances, rights, privileges, and franchises, including the franchise to be a corporation appertaining thereto, then owned or held or which should thereafter be acquired by either of said companies, and also the lands granted by Congress to aid in the construction of said lines of road.

That in the year 1873 John S. Kennedy, John S. Barnes, and Henry M. Baker, on behalf of themselves and all other bondholders under the $15,000,000 mortgage hereinbefore mentioned, filed their bill in equity in this court against the railroad companies hereinbe-
fore mentioned and other defendants, praying, among other
45 things, that a receiver be appointed by the court of all and singular the property, rights, and franchises of said St. Paul & Pacific Company covered by said $15,000,000 mortgage. In which suit such proceedings were had that by order of this court, duly made on the 1st day of August, A. D. 1873, the said Jesse P. Farley, plaintiff herein, was duly appointed receiver of the lines of railroad of the said St. Paul Company covered by said $15,000,000 mortgage, and of all equipments, rolling-stock, machinery, and appurtenances, and all property, rights, and franchises appertaining to said lines of railroad, or either of them, then held or thereafter to be acquired by said St. Paul Company.

That said plaintiff, Jesse P. Farley, duly accepted such trust as such receiver, and duly qualified as such, and took possession of said line and property and retained possession thereof, and operated

said lines, or a portion thereof, until the same was by order of this court turned over to the purchaser thereof, as hereinafter stated.

That prior to October 9th, 1876, George T. M. Davis, one of the trustees of said 2,800,000 mortgage, resigned his trusteeship,
46 and George L. Becker, another of said trustees, was removed from his trusteeship therein, and said John S. Kennedy was appointed trustee in place of said Davis, resigned. That prior to October 9, 1876, said Samuel J. Tilden resigned his trusteeship under said $3,000,000 mortgage, and said John S. Kennedy was appointed trustee in his place.

That prior to October 9th, 1876, said Samuel J. Tilden resigned, & said George L. Becker was removed from his trusteeship under said $6,000,000 mortgage, and said John S. Kennedy was appointed a trustee thereof in place of said Tilden.

That on said 9th day of October, 1876, the said Rice, Thompson, and Kennedy, as trustees in the said $1,200,000 mortgage, took possession of all the property, including the line of railroad, covered thereby, except the land grant appertaining to said road; and on the same day, as trustees in the said $3,000,000 mortgage, took possession of the railroad and appurtenances covered thereby; and that on the same day the said Thompson & Kennedy, as trustees of the $2,800,000 and $6,000,000 mortgages, respectively, took
47 possession of the lines of railroad and property (except the land grants) covered by said mortgages respectively.

That in each case the said persons so taking possession claimed to do so as trustees, and under power in that behalf conferred by said mortgages respectively.

That from the time they so took possession and down to the time when said roads were sold under decrees of foreclosure, as stated in said bill, the said trustees held and operated the same respectively, and during all said period the plaintiff, Jesse P. Farley, was general manager of said lines of said trustees, and had full control of the management thereof; and the said plaintiff continued to be receiver of said lines of the said St. Paul Company covered by said $15,000,000 mortgage, and to manage and operate the same or such part thereof as was, from time to time, constructed and fit for operation down to the time when said lines were sold by this court under decree of foreclosure of this court, and possession thereof delivered to the defendant, The St. Paul, Minneapolis & Manitoba Railway Company, as the purchaser at such sale, and that the said Farley has not yet been discharged by this court as such receiver, and has not yet settled his final accounts as such.

48 And these defendants say that as receiver of said lines covered by said $15,000,000 mortgage the said plaintiff could not lawfully make the arg-eement with these defendants mentioned in the bill of complaint, or engage in the enterprise therein mentioned of purchasing the bonds of said $15,000,000 issue; and that the making of such arg-eement and the entering in such an enterprise by him was a breach of trust on his part as such receiver, and a fraud on the holders of the bonds of said $15,000,000 issue, and was a fraud upon this court, whose receiver he was.

And that as general manager for the trustees in said mortgages of the lines of railroad of said First Division Company the said plaintiff occupied a position of trust & confidence toward his employers, the said trustees, and toward the holders of the bonds secured by said mortgages; and that by making the agreement and engaging and combining in the enterprise of purchasing the said bonds mentioned in his said bill the said Farley was guilty of a breach of trust toward and a fraud upon the said trustees and the said bondholders.

49 And these defendants say that by reason of the said fiduciary positions occupied by the plaintiff, as aforesaid, he is not entitled to the aid of a court of equity to enforce as against these defendants any of the agreements mentioned in said bill, or any rights claimed by him and growing out of said agreements.

Therefore these defendants do plead all and singular the matters aforesaid in bar to the complainant's said bill, and pray the judgment of this honorable court whether they should be compelled to make any further answer to the said bill, and pray to be hence dismissed with their reasonable costs and charges in that behalf most wrongfully sustained.

JAS. J. HILL.

GEO. B. YOUNG &
R. B. GALUSHA,
*Sol'rs & Counselors for Defendants, Kittson & Hill.*

DISTRICT OF MINNESOTA, *ss:*

James J. Hill, being duly sworn, says: That he is one of the defendants in the above-entitled cause, and that the foregoing plea is true in point of fact, and is not interposed for delay; and that

50 the defendant, N. W. Kittson, is absent from the district and State of Minnesota.

JAS. J. HILL.

Subscribed and sworn to, this 1st day of July, A. D. 1881.
[SEAL.] H. E. MANN, *Clerk.*

I certify that, in my opinion, the foregoing plea is well founded in point of law.

GEO. B. YOUNG,
*Counsel for Def'ts, Kittson & Hill.*

And afterwards, to wit, at a stated term of said court, begun and held in the city of St. Paul, in said district, on the third Monday, being the 20th day, of June, A. D. 1881, and on the eighth day of September, A. D. 1881, the following proceeding, among others, was had, to wit:

51 In the Circuit Court of United States, District of Minnesota.

J. P. FARLEY *vs.* N. W. KITTSON *et al.*

This cause is set down for oral argument upon the following questions:

1. Was the contract stated in the bill illegal and void by reason of the facts stated in the plea of respondents, Kittson & Hill?

2. And, if so, can complainant recover, independently of the contract, upon the ground that the illegal transaction has been consum-ated and the proceeds thereof have been received by two of the partners, who may be required to account to the third for his share thereof?

Counsel will be heard on the third day of the next term, or as soon thereafter as practicable. The clerk will furnish counsel with a copy of this order.

GEO. W. McCRARY,
Sept. 6th, 1881. *Circuit Judge.*

52 And afterwards, to wit, at a stated term of said court, begun and held in the city of St. Paul, in said district, on the second Monday, being the 12th day, of December, A. D. 1881, the following proceeding, among others, was had, to wit:

JESSE P. FARLEY *vs.* NORMAN W. KITTSON *et al.*

And now comes the plaintiff and moves for leave to amend his bill, which motion is argued on the part of plaintiff by C. K. Davis, Esq., and on the part of the defendants by Geo. B. Young, Esq., and submitted. Whereupon it is ordered that such leave be, and it is hereby, granted.

And afterwards, to wit, on the 15th day of December, A. D. 1881, came the complainant, by his solicitors, and filed in the clerk's office of said court his bill of complaint as amended, which is in the words and figures following, to wit:

53 In the United States Circuit Court for the District of Minnesota.

To the honorable judges of said court:

Your orator, Jesse P. Farley, of Dubuque, Iowa, and who is a citizen of the State of Iowa, brings this his bill against Norman W. Kittson and James J. Hill, of St. Paul, Minnesota, and who are citizens of the State of Minnesota, and The St. Paul, Minneapolis and Manitoba Railway Company, a corporation created, organized, and existing under the laws of the State of Minnesota and a citizen of said State, and thereupon your orator complains and says:

I.

That in the summer of 1876 he and the said defendants, Norman W. Kittson and James J. Hill, mutually agreed by and between themselves, each with the other, that they would jointly undertake

for their joint, mutual, and equal interest, benefit, advantage, and profit to acquire, by purchase or contract, all the bonds possible to be obtained of the First Division of the St. Paul and Pacific Railroad Company and of the St. Paul and Pacific Railroad Company, corporations created and existing under the laws of the State of
54 Minnesota and owning lines of railroad and other property in said State, which bonds had theretofore been issued by said respective companies, and were outstanding and for sale by the holders thereof at a large discount, and were secured by mortgages upon the lines of road and other property of said companies, and which mortgages were then in process of foreclosure in five several suits in courts in said State for default in the payment of the interest upon said bonds.

That the understanding, object, purpose, and agreement of said parties in acquiring said bonds was to become the purchasers of said lines of railroad and other mortgaged property when offered for sale under decrees for the foreclosure of said mortgages and to turn in and use said bonds in payment, or part payment, therefor, and thereby, through and by means of said bonds, acquire said lines of railroad and other property.

That the said defendant Kittson represented that he could procure from one Donald A. Smith and other capitalists in Canada the necessary funds that would be required in said undertaking.
55 And it was further agreed by and between your orator and said Kittson and Hill that if it should become necessary to do so the said Kittson might use or give to said Smith and others furnishing the required funds an interest with them in said purchases and enterprise, but that the interest not so used or given should be retained and held for the mutual, joint, and equal benefit of your orator and said Kittson and Hill.

It was also then & there further agreed by and between your orator and said Kittson & Hill that the details of the negotiations for procuring the necessary fund and for the purchase of said bonds should be principally conducted and managed by the said Kittson and Hill and such person or persons as an interest in said enterprise should be given to for furnishing funds therefor, and that your orator should furnish such facts, information, and advice and render such aid and assistance therein from time to time as should be required of him. That your orator had knowledge not possessed by any of the other parties as to the whereabouts and situation
56 of said bonds, the rated value thereof by the holders, the mode whereby and the channel through which the same could be reached and procured, also in respect to the situation, amount, character & value of the lines of railroad and property mortgaged to secure said bonds and in respect to the pending suits for the foreclosure of said mortgages, and that the services of your orator in respect to all of said matters and his co-operation were indispensable to the success of said enterprise.

II.

And your orators further alleges that thereupon the said defend-

ant Kittson made arrangements with and procured the said Donald A. Smith, in conjunction with one George Stevens, to join in said enterprise and furnish funds to purchase or secure the control and use of said bonds, as far as found practicable, and to carry out said undertaking; and in consideration thereof agreed to give the said Smith & Stevens a certain fractional interest in said enterprise, but of the precise terms of the agreement with them as to the interest they were to have in said enterprise your orator is not definitely advised, but on information and belief alleges the same
57 to have been one-half; the balance, however, not so agreed to be given to the said Smith and Stevens belonged to your orator and the said Kittson & Hill, in equal proportions, under the said agreement between them.

III.

And your orator further alleges that thereupon and in 1877 active negotiations were opened and carried on by the said Smith, Stevens, Hill, & Kittson and your orator for the purchase of said bonds, in pursuance of the aforesaid understandings and agreements appertaining to said enterprise, and were continued down into the month of June, 1879, and as a result thereof they purchased and secured a large quantity of said bonds, amounting in the aggregate, at their face value and overdue interest, to over $25,000,000.

That said purchases were made by and in the name of said Smith, Stevens, Kittson, and Hill, but for the purpose and with a view to their use in the purchase of said lines of railroad and other mortgaged property when offered for sale under foreclosure decrees, and under and in pursuance of the agreements and understand-
58 ings between your orator and the said Kittson and Hill, hereinbefore stated in respect thereto; that throughout said negotiations for the purchase of said bonds, and in the purchases thereof, your orator was continuously called upon by the said Kittson & Hill for facts and information, advice and co-operation in *in* respect thereto, and at their request furnished and rendered the same pursuant to the aforesaid agreements and understandings between them, and that said negotiations were only successful through and by means of the advice and co-operation of your orator and the facts and information peculiarly within his knowledge as aforesaid, and imparted by him to the said Kittson and Hill at their request, under said understandings and agreements between them as aforesaid; that most of said purchases of said bonds were made under an agreement with the holders thereof, whereby payment therefor was not to be made until decrees of foreclosure of the mortgages given to secure the same should be rendered and the lines of railroad and other property sold under such
59 decrees, and acquired by said purchasers, and a new issue of bonds made, secured by a new mortgage on the same property, whereupon it was optional with the seller of the bonds to demand cash at the agreed purchase-price or to take the new bonds of the newly to be organized company. That it was the understanding on the part of all said parties that as soon as said lines of rail-

road and other mortgaged property should be acquired by them under said decretal sales a new issue of bonds should be made by them or by the company to be organized by them to take, hold, manage, and operate said property, and secured by a new mortgage upon said property of sufficient amount to cover and defray the cost of said bonds and all expenses connected with the carrying out of said enterprise.

Your orator further alleges that nearly all of said bonds (the exact amount is unknown to your orator) were held and owned by residents in Holland, Europe, and that one John S. Kennedy, of New York city, was the duly appointed, constituted, and acting agent and attorney in the United States of a large majority (the exact amount is unknown to your orator) in amount of each class and issue of said bonds, and of the holders and owners thereof, with full power and authority to take such action in respect thereto as
60 in his judgment might seem best; and that he was also a trustee in all the said mortgages, excepting the one for fifteen million dollars on the extension line, and that he was the agent for and held and represented over eleven million dollars of the bonds issued under and secured by said fifteen million mortgage, and that he was plaintiff in all said foreclosure suits, excepting the one to for-close said fifteen million mortgage, and that all said suits were caused to be commenced by him, as such agent, and were prosecuted under and subject to his general control and direction as such agent and trustee, and that your orator was appointed receiver of the property of the St. Paul and Pacific Railroad Company, and was made general manager of the lines of road of the first division of the St. Paul and Pacific Railroad Company, under the trustees in said mortgages in possession thereof, upon the recommendation and at the instance and request of said Kennedy.

And your orator states that after said agreement between him and said Kittson and Hill, and before the decree of foreclosure in
61 said suits, and before the said purchase of said bonds, or any of them, and while negotiations were pending for the purchase of the bonds represented by the said Kennedy as aforesaid, he, the plaintiff, informed the said Kennedy of his said interest and connection with the said Kittson and Hill in the project for the purchase of said bonds, and that the said Kennedy had full notice and knowledge that he was so connected therewith and interested therein, and fully approved and sanctioned the same, and that the negotiations which resulted in the purchase of said bonds, as aforesaid, were mainly had with and conducted by the said Kennedy, on behalf of said bondholders, as their agent in the premises, and said bonds, when so purchased, were placed in the hands of said Kennedy and his copartner, John S. Barnes, as trustees, to be held by them until paid for, pursuant to the contract of purchase, and were so held, and only delivered upon payment therefor, pursuant to the agreement of purchase; and the said Kennedy, as agent, as aforesaid, strongly recommended the bondholders to sell their bonds upon the terms offered by the said Stephens, Smith, Kittson,
62 and Hill, as the best disposition of them that could be made; and that but very few of said bonds were purchased by said

Stephens, Smith, Kittson, and Hill, except under and through the said negotiations with the said Kennedy therefor.

And your orator says that to all inquiries made by the said Kennedy, or any of the trustees in said mortgages, or by any of the holders of any of the bonds secured thereby, or by any one interested in the property under his charge as manager and receiver, he at all times gave full and true answers and information, to the best and utmost of his knowledge and ability, and kept the said Kennedy fully informed of all facts, matters, and things coming to his knowledge affecting said property, and in all things acted honestly and in good faith towards all persons interested in the property under his control, as receiver and manager, as aforesaid.

And your orator states that the suit in which he was so appointed receiver of the property of the St. Paul and Pacific Railroad Company was not a suit for the foreclosure of any mort-
63 gage, but was a suit commenced in this court by the said Kennedy and his copartners, on behalf of themselves and other bondholders, simply to have a receiver appointed of said property with a view to its preservation and the completion of certain unfinished sections of the lines of road of said company.

IV.

And your orator further alleges that the said defendant, The St. Paul, Minneapolis and Manitoba Railway Company, is a corporation organized in May, 1879, under the laws of the State of Minnesota, by the said Smith, Stevens, Kittson, & Hill, for the purpose of acquiring, taking, holding, operating, and ma-ging said lines of railroad and other mortgaged property, for the use and benefit of the said parties interested in the purchase of said bonds as aforesaid, when said lines of railroad and other mortgaged property should be acquired by or for them, or offered for sale under said fore-
64 closure decrees; and that the said Smith, Stevens, Kittson, & Hill are directors and officers of said company and have the control and management of the same.

V.

Your orator further alleges that in the months of March and April, 1879, foreclosure decrees were duly had, taken, and entered in said pending suits for the foreclosure of said mortgages given to secure said bonds, directing the sale at public auction of the said lines of railroad and other property of the said mortgagor railroad companies covered by said mortgages; which decrees severally pro-
65 vided, among other things, that in payment for the mortgaged property so ordered to be sold the said mortgage bonds and overdue coupons should be taken as cash for such an amount as would equal the dividend to which they would be finally entitled *pro rata* under the decrees, and that in the months of May and June, 1879, sales were duly had and made of said lines of railroad and other mortgaged property, under and pursuant to said foreclosure decrees, and the same were all bid in, purchased, or acquired by the said St. Paul, Minneapolis and Manitoba Railway Company for the

use & benefit of the aforesaid parties in interest in the purchase of said bonds as aforesaid, including your orator, by the direction and procurement of the said Kittson, Hill, Smith, and Stevens; and that all of said bonds which had been purchased as aforesaid were turned in and used in payment of said lines of railroad and property by the said Kittson, Hill, Smith, & Stevens; and that the said railway company paid nothing in the purchase of said railroads and property, but took the same without consideration, except the consideration furnished and provided by your orator and said Kittson, Hill,
66 Smith, & Stevens, and which consideration so furnished and provided, aside from said bonds as aforesaid, was furnished by the said Smith and Stevens pursuant to the aforesaid arrangement with them for joining in said enterprise. That over five hundred miles of railroad in said State of Minnesota, with the equipments appertaining thereto, and over one million acres of land in said State, and much other valuable property, and in all worth over $15,000,000, were thereby acquired and became vested in said defendant railway company for the use and benefit of your orator and the said Kittson, Hill, Smith, and Stevens, in proportion to their several and respective interest in said bonds so purchased as aforesaid, subject only to the advances made and obligations incurred in connection with said enterprise. At the time of the said purchase of said lines of railroad and other mortgaged property and at the time of the use of said bonds as aforesaid in payment therefor, and at the time said property was vested in said defendant railway company, the said Smith and Stevens and the said railway
67 company had notice & knowledge that your orator was jointly and equally interested in said bonds so purchased as aforesaid and in said undertaking and enterprise with the said Kittson and Hill.

VI.

Your orator further states that on the 21st day of June, 1879, the said defendant railway company, by the direction of the said Stevens, Smith, Kittson, and Hill, issued and negotiated its bonds to the amount — $8,000,000, payable in 1909, with interest, payable half yearly, at seven per cent. per annum; and at the same date executed a mortgage or trust deed to secure said bonds on said lines of railroad, lands, & all other property of said company; & that said bonds and the proceeds thereof were used so far as was necessary to pay the cost of said bonds so purchased as aforesaid, and all other expenses incurred or incident to said enterprise; and that said $8,000,000 of bonds and the proceeds thereof were more than sufficient for said purpose.

VII.

That since June 15th, 1879, said defendant railway com-
68 pany, under the control and management of said Smith, Stevens, Kittson, and Hill, has been in the possession of said lines of railroad, lands, and other property, and has operated said

railroads, and has received from the earnings thereof over $500,000 over and above operating expenses and interest on said $8,000,000 mortgage, and has also sold large quantities of lands and other property, acquired as aforesaid, and realized therefrom large sums of money, but the amount thereof your orator is unable to state, and has also made expenditures in connection with said property, but the amount thereof is unknown to your orator.

VIII.

The capital stock of said defendant railway company is $15,000,000, divided into shares of $100 each, which stock now represents the said property so acquired by the said railway company, and constitutes in part the profits arising and resulting from said enterprise, but that aside from said stock other profits, amounting to many hundred thousand dollars, have been realized from said en-
69 terprise through the agency of said railway company and otherwise, and have been divided between said Smith, Stevens, Kittson, and Hill.

That a large amount of the said capital stock of said railway company has been issued by said company and divided between said Smith, Stevens, Kittson, and Hill, and that the said railway company has delivered to the said Kittson and Hill fifty-seven thousand six hundred and forty-six shares thereof—to the said Kittson, one-half thereof in his own individual name and right, and to the said Hill, one-half thereof in his own individual name and right—being a portion and part thereof to which your orator and the said Kittson and Hill are entitled under and pursuant to the said arrangement made with said Smith and Stevens in connection with said enterprise; and that said railway company has neglected and refused, and still neglects and refuses, to deliver to your orator any part of said stock so issued, and that said stock is worth par value.

IX.

Your orator further shows that the said defendants, Kittson and Hill, never denied, disputed, or questioned, but always ad-
70 mitted and recognized the right of your orator under the said agreement and understanding between them to an equal share and interest in said enterprise and in the results and avails thereof with them, the said Kittson and Hill, until after the organization of said defendant railway company in May, 1879, and then, at first, only intimated or suggested to your orator that his share or interest ought not to be equal to theirs, as they had, they claimed, be- required to advance some money in carrying out said enterprise.

But now so it is, may it please your honors, that the said Norman W. Kittson and James J. Hill, colluding and confederating with each other and with the said defendant railway company to wrong and defraud your orator, give out and pretend that he has no rights or interest in said enterprise, or in the benefits, results, avails, or profits thereof, and refuse to deliver or turn over to him any of the said capital stock in said railway company so received by them, or

account to him therefor, and refuse to pay over or account to him for any of the results, avails, or profits of said enterprise received or realized by them, and refuse to render him any state-
71 ment or account appertaining to said enterprise, and have thus far, and claim that they will in the future, wholly appropriate to their own use, to the entire exclusion of your orator, all the results, avails, and profits of said enterprise and undertaking to which said Smith and Stevens are not entitled, under the aforesaid agreement made with them; and the said defendant railway company, conspiring with the said Kittson and Hill to cheat and defraud your orator, refuses to account to him for his interest in the said property and effects, and every part thereof which have come to its possession and been appropriated by it as aforesaid, and has refused, and still refuses, to issue to him his proportion or any of its capital stock, and has wrongfully and fraudulently issued the same in part to the said Kittson and Hill, and refused to account to your orator for any of the profits accruing from said lines of railroad, lands, and other property, but persists in ignoring and disregarding the rights of your orator in the premises; all which actings, doings, and pretenses are contrary to equity and good conscience, and tend to manifest wrong and injury of your orator in the
72 premises. In consideration whereof, and forasmuch as your orator can only have adequate relief in the premises in this honorable court, where matters of this nature are properly cognizable and relievable.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed for, and may, to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the matters aforesaid (but the oath of said defendants thereto and of each of them is hereby waived), as fully and particularly as if the same were here repeated, and they and each of them distinctly interrogated in respect thereto; and more especially that the said defendants, Kittson and Hill, may answer and set forth the terms and conditions of the said agreement and understanding made or had with the said Smith and Stevens in respect to said enterprise and undertaking, and the amount of said bonds purchased or acquired, and the cost thereof, and all expenses connected with and incident to said enterprise, and the
73 amount of money, if any, actually furnished by them, and when, in connection with said enterprise, and the amount furnished by said Smith and Stevens, and when and how and where and for what all moneys so furnished were paid out, and when and how and from what source the same have been repaid, and what dividend or profits in money, bonds, stocks, and other effects have been made, turned over to, or received by them, the said Kittson and Hill, or either of them, resulting from or appertaining to said enterprise; and that the said defendant railway company may also more especially set forth what moneys, bonds, stocks, and other effects have been paid or turned over by it to or for the said defendants, Kittson and Hill, and upon what consideration; and also what

property is now held by it, and what lands and other property have been sold by it, and when and to whom, and upon what consideration, and also what use has been made of the bonds and of the proceeds thereof which have been issued by said railway company and secured by mortgage upon its property;

And that an account may be taken, by and under the order
74 and direction of this honorable court, of all monies paid out and of all property and effects acquired by — under and pursuant to said undertaking and enterprise, and of the disposition made thereof, and of the property acquired by said defendant railway company, and of the disposition made of the bonds or proceeds thereof which have been issued by said defendant railway company, and of the monies, bonds, stocks, and other effects which have been received by said defendants, Kittson and Hill, or either of them, as profits, avails, or results arising or accruing from said enterprise and undertaking, and of all other matters appertaining to said enterprise; and that the said Kittson and Hill be ordered, adjudged, and decreed to pay and turn over to your orator one-third of all monies, bonds, stock, & effects that shall be found to have been received by them, resulting or accruing from said enterprise and undertaking; and that your orator be decreed and adjudged to be entitled to an equal interest with said Kittson and Hill in said enterprise and undertaking, and in the benefits, avails, and profits resulting
75 therefrom; and that said defendant railway company be declared and adjudged to issue to your orator his just and due proportion of its capital stock, and to account to your orator for his proportion and share of the property which has come to its possession, and for the avails, results, and profits thereof, and to recognize the rights of your orator in the stock and property of said company as equal to the said Kittson and Hill; and that your orator may have such other and further relief in the premises as the nature of the case may require and to this honorable court may seem meet:

And may it please your honors to grant unto your orator a writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the said Norman W. Kittson, James J. Hill, and the said Saint Paul, Minneapolis and Manitoba Railway Company, defendants, commanding them, and each of them, on a day certain therein to be named, and under a certain penalty, to be and appear in this honorable court,
76 then and there to answer all and singular the premises, and to stand to, perform, and abide such further order, direction, and decree as may be made against them.

GILMAN & CLOUGH,
GRIFFITH & KNIGHT, &
DAVIS, WILSON & O'BRIEN,
*Solicitors for Plaintiff.*

J. M. GILMAN & C. K. DAVIS,
*Of Counsel.*

77 And afterwards, to wit, at a stated term of said court, begun and held in the city of St. Paul, in said district, on the second

Monday, *in* being the 12th day, of December, on the 15th day of December, 1881, the following proceedings, among others, were had, to wit:

JESSE P. FARLEY *vs.* NORMAN W. KITTSON.

On motion of defendants it is ordered that they have until February rule day to plead, answer, or demur to the plaintiff's amended bill, and that the cause stand continued until the next term of this court.

And afterwards, to wit, on the 11th day of February, A. D. 1882, came the defendant, The St. Paul, Minneapolis & Manitoba Railway Company, by its solicitors, and filed in the clerk's office of said court its demurrer to plaintiff's amended bill of complaint, which is in the words and figures following, to wit:

78 Circuit Court of the United States for the District of Minnesota. In Equity.

JESSE P. FARLEY
*vs.*
NORMAN W. KITTSON, JAMES J. HILL, and THE ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY.

The demurrer of The Saint Paul, Minneapolis and Manitoba Railway Company, one of the defendants in the above-entitled cause, to the above bill of complaint, as amended, of Jesse P. Farley, the plaintiff in said cause.

The defendant, by protestation, not confessing or acknowledging all or any of the matters and things contained in said bill of complaint, as amended, to be true in such manner and form as the same are therein set forth and alleged, doth demur to said bill, as amended, and for cause of demurrer showeth:

That the said plaintiff hath not in and by his said bill, as amended, as aforesaid, made or stated such a case as doth or ought to
79 entitle him to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, as amended, this defendant doth demur thereto, and demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, as amended, as aforesaid, or to any of the matters and things therein contained, and humbly prays to be hence dismissed, with its costs and charges in this behalf most wrongfully sustained.

BIGELOW, FLANDRAU & SQUIRES,
*Solicitors for Def't, The St. Paul, Minneapolis and Manitoba Railway Company.*

H. R. BIGELOW,
*Of Counsel.*

UNITED STATES OF AMERICA:

Circuit Court of the United States for the District of Minnesota.

I, Horace R. Bigelow, of St. Paul, Minnesota, a counselor
80 of this court, do hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

H. R. BIGELOW.

UNITED STATES OF AMERICA, } ss:
*District of Minnesota,* }

Edward Sawyer, of the city of St. Paul, in said district, being duly sworn, says: He is the secretary of the Saint Paul, Minneapolis and Manitoba Railway Company, defendant named in the foregoing demurrer, and that said demurrer is not interposed for delay.

E. SAWYER.

Subscribed and sworn to before me, this 11th day of February, A. D. 1882.

[SEAL.]

GEO. C. SQUIRES,
*Notary Public, Minnesota.*

And afterwards, to wit, on the 14th day of February, 1882, came the defendants, by their attorneys, and filed in the clerk's office of said court a stipulation of the plaintiff herein, by his solicitors, which is in the words and figures following, to wit:

81 United States Circuit Court, Minnesota. In Equity.

JESSE P. FARLEY

*v.*

A. W. KITTSON, JAMES J. HILL, and THE ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY CO.

It is stipulated that the defendants may have ten (10) days' additional time in which to plead, answer, or demur to the plaintiff's amended bill of complaint.

GILMAN & CLOUGH,
*Solicitors for Pl'ff.*

February 3, 1882.

And afterwards, to wit, on the 16th day of February, A. D. 1882, came the defendants, Kittson & Hill, by their solicitors, and filed in the clerk's office of said court their plea to the plaintiff's amended bill of complaint, which is in the words and figures following, to wit:

82 United States Circuit Court, District of Minnesota. In Equity.

JESSE P. FARLEY
*v.*
NORMAN W. KITTSON, JAMES J. HILL, and THE ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY.

The plea of Norman W. Kittson and James J. Hill, two of the above-named defendants, to the bill of complaint of Jesse P. Farley, complainant.

These defendants and each of them, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill of complaint mentioned and contained to be true in such manner and form as the same are therein set forth and alleged, for plea to the whole of said bill say:

That the bonds of the St. Paul & Pacific Railroad Company (which will be hereinafter styled the St. Paul Company), mentioned in said bill, were bonds of an issue of twelve hundred thou-
83 sand dollars, made and executed by said St. Paul Company, bearing date the second day of June, 1862, and which bonds were secured by a mortgage or trust deed of the same date, made and executed by said St. Paul Company to Edmund Rice, Horace Thompson, and Samuel J. Tilden, as trustees, by which trust deed or mortgage the said St. Paul Company conveyed to said trustees all that portion of its line of railroad extending from the city of St. Paul via St. Anthony to the town of Watab, on the Mississippi river, together with all structures, grounds, equipment, and rolling-stock belonging to said portion of its line so conveyed, and all the rights, privileges, and franchises appertaining to said line of road so conveyed, including the franchise to be a corporation, then held or which should thereafter be acquired by said company, and also the lands granted by the Congress of the United States to aid in the construction of said road, and which then had been or should thereafter be acquired by said company under the act of Congress making said grant.

84 That in the summer of 1876 the said Samuel J. Tilden resigned his office of trustee under the said trust deed or mortgage, and one John S. Kennedy, mentioned in said bill of complaint, was, pursuant to the terms thereof, duly appointed trustee in his place.

That the bonds of the First Division of the St. Paul and Pacific Railroad Company (which will hereafter be styled the First Division Company), mentioned in said bill, were bonds of the following issues, and were all made and executed by said company:

1. An issue of two million eight hundred thousand dollars, the bonds of which issue bore date and were issued on the 1st day of September, 1865, and were payable, with interest, semi-annually, at the rate of seven per cent., on the first day of December, 1905, which said bonds were secured by a mortgage or trust deed made by said First Division Company (which had succeeded said St. Paul Company in the ownership of all the property embraced in the $1,200,000

mortgage or trust deed hereinbefore mentioned) to George L. Becker, George T. M. Davis, and the said Horace Thompson, as trus-
85 tees, by which mortgage or trust deed the said First Division Company did convey to said trustees, in trust to secure the payment of the principal and interest of said bonds, all the property described in said mortgage of June 2, 1862, and also certain other lands to the amount of four sections per mile which had been granted by Congress to aid in the construction of said line, which said mortgage or trust deed bore date the 1st day of September, 1865.

2. An issue of bonds to the amount of three millions of dollars, bearing date on the 1st of March, 1864, payable May 1, 1894, with interest, payable semi-annually, on the first days of May and November in each year, at the rate of seven per cent. per annum, which said bonds were secured by a mortgage or trust deed, bearing date March 1st, 1864, made by said First Division Company to Edmund Rice, Horace Thompson, and Samuel J. Tilden aforesaid, upon that part of its line of railroad known as its main line, extending from St. Anthony aforesaid to a point 150 miles westerly therefrom, and the appurtenances, equipment, and corporate franchises pertaining thereunto then held or which might be
86 thereafter acquired by said First Division Company, and also the land grant of six sections per mile with which said company was endowed by act of Congress to aid in construction of said line.

3. An issue of bonds to the amount of $6,000,000, bearing date July 1st, 1868, and payable July 1st, 1898, with semi-annual interest at 7% per annum, payable on the 1st day of May and November in each year, to secure the payment of which bonds and interest the said First Division Company did, by a trust deed or mortgage, bearing date said July 1, 1868, convey unto the said George L. Becker, Horace Thompson, and Samuel J. Tilden, trustees, its entire main line, extending from St. Anthony aforesaid to Breckenridge, a distance of 207 miles (and including the 150 miles embraced in said 3,000,000 mortgage), together with all appurtenances, equipments, corporate franchises, including the franchise to be a corporation, belonging or anywise appertaining to said main line, and also all lands granted by Congress to aid in the construction thereof, except the lands embraced in said $3,000,000 mortgage.

4. An issue of bonds to the amount of fifteen million dol-
87 lars made and issued by said First Division Company, bearing date the 1st day of April, 1871, and payable thirty years thereafter, with interest at seven per cent. per annum, payable semi-annually on the first days of January and July in each year, the payment of the principal and interest of which bonds was secured by a mortgage or trust deed, bearing date April 1, 1871, made by said St. Paul Company to the said George L. Becker and Horace Thompson and one Wm. G. Moorhead, as trustees, whereby the said St. Paul Company conveyed to said trustees its lines of railroad extending from St. Cloud to St. Vincent, in Minnesota, a distance of about 310 miles, and from Watab aforesaid to Brainerd, in said State, a distance of about sixty miles, together with the equipments,

appurtenances, rights, privileges, and franchises, including the franchise to be a corporation, appertaining thereto, then held or owned or which should thereafter be acquired by either of said companies, and also the lands granted by Congress to aid in the construction of said lines of road.

88 That in the year 1873 the said John S. Kennedy, John S. Barnes, and Henry M. Baker, on behalf of themselves and all the bondholders under the $15,000,000 mortgage hereinbefore mentioned, filed their bill in equity in this court against the railroad companies hereinbefore mentioned and other defendants, praying, among other things, that said mortgage be foreclosed and the mortgaged property be sold under decree of this court, and that a receiver be appointed of all and singular the property, rights, and franchises of said St. Paul & Pacific Company covered by said $15,000,000 mortgage; in which suit such proceedings were had that, by order of this court duly made on the 1st day of August, A. D. 1873, the said Jesse P. Farley, the plaintiff herein, was duly appointed receiver of the lines of railroad of said St. Paul Company covered by said $15,000,000 mortgage, and all equipment, rolling stock, machinery, and appurtenances, and all property, rights, and franchises appertaining to said lines of railroad, or either of them, then held or thereafter to be acquired by said St. Paul Company.

That said plaintiff, Jesse P. Farley, duly accepted such trust as such receiver, and duly qualified as such, and took possession
89 of said lines and property, and retained possession thereof, and operated said lines, or a portion thereof, until the same *was*, by order of this court, turned over to the purchaser thereof, as hereinafter stated.

That prior to October 9th, 1876, George T. M. Davis, one of the trustees of said $2,800,000 mortgage, resigned his trusteeship, and George L. Becker, and others of said trustees, was removed from his trusteeship therein, and said John S. Kennedy was appointed trustee in place of said Davis, resigned.

That prior to October 9th, 1876, said Samuel J. Tilden resigned his trusteeship under said $3,000,000 mortgage, and said John S. Kennedy was appointed trustee in his place.

That prior to October 9th, 1876, said Samuel J. Tilden resigned and said George L. Becker was removed from his trusteeship under said $6,000,000 mortgage, and said John S. Kennedy was appointed a trustee thereof in place of said Tilden.

That on said 9th day of October, 1876, the said Rice, Thompson, and Kennedy, as trustees in the said $1,200,000 mortgage,
90 took possession of all the property, including the line of railroad covered thereby, except the land grant appertaining to said road, and on the same day, as trustees in the said $3,000,000 mortgage, took possession of the railroad and appurtenances covered thereby.

And that on the same day the said Thompson and Kennedy, as trustees of the $2,800,000 and $6,000,000 mortgages, respectively, took possession of the lines of railroad and property (except the land grants) covered by said mortgages respectively.

That in each case the said persons so taking possession claimed to do so as trustees, and under power in that behalf conferred by said mortgages respectively.

That from the time they so took possession, and down to the time when said roads were sold under decree of foreclosure and turned over to the purchaser thereof after confirmation of said respective sales, as stated in said bill, the said trustees held and operated the same respectively; and during all said period the plaintiff, Jesse P. Farley, was general manager of said lines for said trustees, and had full control of the management thereof, and the said plain-
91 tiff continued to be receiver of said lines of the said St. Paul Company covered by said $15,000,000 mortgage, and to manage and operate the same, or such part thereof as was from time to time constructed and fit for operation, down to the time when said lines were sold by this court under a decree of foreclosure of this court, and said sale was confirmed by this court, and by order of this court possession of said lines was delivered to the defendant, The St. Paul, Minneapolis & Manitoba Railway Company, as the purchaser at such sale; and that the said Farley has not yet been discharged by this court as such receiver, and has not yet settled his final accounts as such.

That the said plaintiff never at any time informed the said Kennedy, nor any of the holders of any of said mortgage bonds, of his interest in the project for purchasing said bonds or of his interest in the project of acquiring by means of said bonds the said mortgaged property, which he alleges in his bill of complaint; nor did the said Kennedy, nor any of said bondholders, know, suspect,
92 or have any information or belief at any time until after the confirmation of all said foreclosure sales that the plaintiff ever claimed to have any such interest, or any interest in said projects, or either of them.

And these defendants say that as receiver of said lines covered by by said $15,000,000 mortgage the said plaintiff could not lawfully make the agreement with these defendants mentioned in the bill of complaint or engage in the enterprise therein mentioned of purchasing the bonds of said $15,000,000 issue, or in the enterprise of purchasing said mortgaged property, and that the making of such an agreement and the embarking in such an enterprise by him was a breach of trust on his part as such receiver and a fraud on the holders of the bonds of said $15,000,000 issue, and was a fraud upon this court, whose receiver he was.

And that as general manager for the trustees in said mortgages of the lines of railroad of said First Division Company the said plaintiff occupied a position of trust and confidence toward his employers, the said trustees, and towards the holders of the bonds secured by said mortgages, and that by making the agreement and engaging
93 and continuing in the enterprise of purchasing the said bonds and said mortgaged property mentioned in his said bill the said Farley was guilty of a breach of trust toward and a fraud upon the said trustees and the said bondholders.

And these defendants say that by reason of the said fiduciary po-

sitions occupied by the plaintiff, as aforesaid, he is not entitled to the aid of a court of equity to enforce as against these defendants any of the agreements mentioned in said bill or any rights claimed by him and growing out of said agreements.

Therefore these defendants do plead all and singular the matters aforesaid in bar to the complainant's said bill, and pray the judgment of this honorable court whether they should be compelled to make any further answer to the said bill, and pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) JAS. J. HILL.

R. B. GALUSHA,
GEO. B. YOUNG,

94 *Solicitors & Counsel for Def'ts, Kittson and Hill.*

We certify that the foregoing plea is, in our opinion, well founded in point of law.

(Signed) R. B. GALUSHA,
GEO. B. YOUNG,
*Counsel for Def'ts, Kittson & Hill.*

DISTRICT OF MINNESOTA, *ss:*

James J. Hill, one of the above-named defendants, being duly sworn, makes oath and says: That the foregoing plea is true in point of fact, and is not interposed for delay, and that the defendant, Norman W. Kittson, is absent from the State and district of Minnesota.

(Signed) JAS. J. HILL.

Subscribed and sworn to this 15th day of February, A. D. 1882, before me—

[SEAL.] H. E. MANN, *Clerk.*

95 And afterwards, to wit, on the sixth day of March, A. D. 1882, came the complainant, by his solicitor, and filed in the clerk's office of said court his replication to the plea of the defendants, Kittson & Hill, to the plaintiff's bill of complaint, as amended, in the words and figures following, to wit:

96 United States Circuit Court, District of Minnesota.

JESSE P. FARLEY, Pl'ff,
*vs.*
JAMES J. HILL, N. W. KITTSON, and THE ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY CO., Def'ts.

The replication of the said plaintiff, Jesse P. Farley, to the plea of the defendants, James J. Hill & N. W. Kittson, to the amended bill in said action.

The repliant, saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies of said plea, for replication thereto says that he will aver and prove his

said bill as amended to be true, certain, and sufficient in the law to be answered unto, and that the said plea of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said plea contained material or effectual in the law to be re-
97 plied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and hereby pray as in his said bill — has already prayed.

GRIFFITH & KNIGHT &
GILMAN & CLOUGH,
*Solicitors & of Counsel for Complainant.*

98 And afterwards, to wit, at rules, held in the clerk's office of said court on the sixth day of March, A. D. 1882, the following proceeding, among others, was had, to wit:

JESSE P. FARLEY *vs.* NORMAN W. KITTSON *et al.*

Upon motion of Messrs. Gilman & Clough, complainant's solicitors, it is ordered that the demurrer of the defendant, The St. Paul, Minneapolis & Manitoba Railway Company, to the plaintiff's amended bill of complaint in this cause be, and it is hereby, set down for hearing at the term of court to be held on the third Monday, being the 19th day, of June, 1882, at the opening of court on that day, or as soon thereafter as counsel can be heard.

And afterwards, to wit, at rules, held in the clerk's office of said court on the 9th day of June, A. D. 1882, the following proceeding, among others, was had, to wit:

JESSE P. FARLEY *vs.* NORMAN W. KITTSON *et al.*

99 Upon motion of Messrs. Gilman & Clough, complainant's solicitors, it is ordered that the plea of the defendants, Kittson & Hill, to the plaintiff's amended bill of complaint herein be, and it is hereby, set down for hearing at the term of court to be held on the third Monday in June, being the 19th day of June, A. D. 1882, at the opening of court on that day, or as soon thereafter as counsel can be heard.

100 And afterwards, to wit, at a stated term of said court begun and held in the city of St. Paul, in said district, on the third Monday in June, A. D. 1882, being the 19th day of June, 1882, on the 21st day of June, A. D. 1882, the following proceeding, among others, was had, to wit:

J. P. FARLEY *vs.* NORMAN W. KITTSON *et al.*

The demurrer of the defendant, The St. Paul, Minneapolis and Manitoba Railway Co., and the plea of the defendants, Kittson & Hill, came on for hearing and argument, and the same being argued was submitted to the court, and by the court taken under advisement.

And afterwards, to wit, at a stated term of said court begun and held in the city of St. Paul, in said district, on the third Monday in June, A. D. 1882, being the nineteenth day of June, on the 30th day of June, 1882, the following proceeding, among others, was had, to wit:

JESSE P. FARLEY *vs.* NORMAN W. KITTSON *et al.*

101 The demurrer of the defendant, The St. Paul, Minneapolis & Manitoba Railway Company, to the plaintiff's bill of complaint having been heretofore argued and submitted and by the court taken under advisement:

Now, the court being fully advised in the premises, it is ordered that the said demurrer be, and the same is hereby, overruled, with leave to the said defendant to plead to or answer the said bill.

And afterwards, to wit, at a stated term of said court begun and held in the city of St. Paul, in said district, on the third Monday in —, being the 19th day of June, A. D. 1882, on the third day of July, A. D. 1882, the following proceeding, among others, was had, to wit:

JESSE P. FARLEY

*vs.*

THE ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY, NORMAN W. KITTSON & JAMES J. HILL.

102 The demurrer of the defendant, The St. Paul, Minneapolis & Manitoba Railway Company, to the plaintiff's amended bill of complaint having been overruled, upon the application of said defendant it is ordered that the plea of the defendants, Norman W. Kittson and James J. Hill, to said amended bill do stand as the joint and several plea of all the defendants thereto.

And this cause coming on to be heard upon the said bill, plea, and proofs, the plaintiff appearing by John M. Gilman, Esq., the defendant railroad company by Horace R. Bigelow, Esq., and the other defendants by Geo. B. Young, Esq., the same was argued and submitted and by the court taken under advisement.

And afterwards, to wit, at a stated term of said court begun and held in the city of St. Paul, in said district, on the third Monday, being the 19th day, of June, 1882, on the 15th day of July, A. D. 1882, the following proceeding, among others, was had, to wit:

JESSE P. FARLEY

*vs.*

ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY, NORMAN W. KITTSON, and JAMES J. HILL.

103 This cause having been heard at this term of this court upon the bill of complaint, pleas thereto, replications, and proofs, and submitted and by the court taken under advisement:

Now, the court being fully advised in the premises, it is by the

court ordered, adjudged, and decreed that the pleas of the defendants to the plaintiff's bill of complaint herein be, and the same are hereby, sustained, and that the plaintiff's said bill of complaint be, and the same is hereby, dismissed out of court, and that the defendants recover of the plaintiff their costs to be taxed, and that execution issue therefor.

104 United States Circuit Court, District of Minnesota.

JESSE P. FARLEY *vs.* N. W. KITTSON *et al.*

TREAT, *District Judge:*

The railroad company, one of the defendants, has interposed a general demurrer, and the other defendants have put in a plea.

As to the demurrer, the court holds that the railroad defendant is, on the theory of the bill and the averments made in it, a proper and possibly a necessary party. It is obvious that under said averments the relief sought cannot be had in the absence of the demurrant, and possibly without the presence of Stephen & Smith. As the demurrer is not based on the defect of parties, it is unnecessary for the court, at the present stage of the suit, to discuss or decide anything with respect to that point.

It must suffice that the demurrer should be overruled so
105 that the demurrant may continue before the court to respond to whatever may hereafter be decreed as to the rights of the respective parties.

This ruling is now announced so that said defendant may join in the plea pending, or answer as counsel may determine.

The court has not yet taken up the plea for consideration for two reasons:

First. Its whole time has been occupied with other cases; and

Second. It has waited for a brief or oral argument from the leading counsel for the other defendants.

The case is too important and the questions too intricate to be passed upon without the fullest aid counsel can give and the most mature deliberation in the light of argument and authorities.

106 United States Circuit Court, District of Minnesota. In Equity.

JESSE P. FARLEY *vs.* NORMAN W. KITTSON *et al.*

TREAT, *District Judge:*

This case is before the court on a joint plea and the evidence pertaining thereto.

Counsel on either side have given the largest aid to the court by oral arguments, elaborate briefs, and full citation of authorities, and therefore, however interesting an exhaustive review might be, if time permitted, the task is unnecessary. It must suffice to state that the supposed conflict of authority, when the cases are analyzed, disappears, so far at least as the rules of equity decisive of the questions now to be determined are involved.

It is a controlling maxim that a court of equity will not aid parties in the perpetration or consum-ation of a fraud, nor give any assistance whereby either of the parties connected with a betrayal
107 of a trust can derive any advantage therefrom. It is contended that this case does not fall within the general rule, because the fraudulent scheme ended with the purchase of the bonds, and the aid of the court is not invoked to enforce the same. It is clearly shown, however, that such purchase was merely the ini-atory step towards effecting the main design. The theory of the bill, the plaintiff's own testimony, and all the facts and circumstances proved demonstrate that the scheme was to acquire the large railroad properties through the acquisition and use of the depreciated bonds. The plaintiff urges that he devised the plan, and that without the assistance he alone could give the plan would necessarily fail. He goes even further in disclosing that it was only through concealment of his connection with the operations could success be reached. He held an eminently fiduciary relation to all interested in the property committed to his management, and it was through information thus acquired and conceded from the beneficiaries, also from the State and U. S. courts, that the contemplated fraud could be *a*ffected.

108 It may be conceded that in private trusts, where constructive frauds have been consummated, and the wronged parties do not complain, courts have refused to listen to volunteers, or, as between parties litigant, examine into the means whereby the one or the other has become charged with a new trust toward his associates. This rule rests largely on the reason that the court is called upon not to ascertain the sources whence the fund was derived, in the absence of beneficiaries complaining, but merely to decide whether a new trust was created which has been or is about to be violated.

It may be that there is discernible in adjudged cases a distinction between acts *mala prohibita* and *mala in se*, through which funds have come into the hands of one confederate for the benefit of all—acts which have no intrinsic turpitude farther than is implied in the violation of a mere statutory prohibition. The strongest case cited for plaintiff—Brooks *vs.* Martin, 2 Wall.—contains that element, and seems to be shaded with the thought that the parties sought to be protected by the statute not only failed to complain, but most
109 of them ratified expressly all that had been done. That case was peculiar in many of its features, and, like the English cases cited in the opinion, is clearly distinguishable from the transactions now under review. In those cases there was no act of moral turpitude, like the betrayal of trusts for selfish greed, which called for investigation, but merely the relationship of the litigant parties, independent of prior dealings between them and others. In Brooks *vs.* Martin the court examined into the assignment obtained by Brooks from his partner Martin through actual fraud, and ruled that he could not shield himself from the consequences of that fraud by showing a prior violation of a prohibited act in which they were participants, even if such a violation, consum-ated, furnished the

trust fund assigned. To hold otherwise would have permit-ed a person to escape the consequences of one fraud by setting up another and distinct fraud in which the litigants had previously participated. To escape the result of a fraudulent assignment, Brooks urged on the court as a defence that said fraudulent assign-
110 ment was connected with a joint fraud theretofore committed. Such a defence the court refused to consider.

There is another class of cases—the most pointed of all—the rigid enforcement of whose rules is essential to the pure administration of justice. Those rules not only forbid one charged with an official duty of a fiduciary nature from betraying his trust for private gain or any purpose whatever, and among other penalties subjects him to whatever loss may fall on him through the dishonesty of his confederates.

That salutary end is effected by a resolute refusal to give him any aid towards the enforcement against his confederates of their fraudulent scheme. Courts will not, and ought not to, be made the agencies whereby frauds are to be in any respect recognized or aided. They will not unravel a tangled web of fraud for the benefit of any one enmeshed therein through whose agency the web was woven. Especially must that be the rule where a trusted officer of a court, whose position is both advisory and fiduciary, seeks its assistance to compel confederates to share with him the spoils acquired
111 through his concealments and deceits, which he admits were deemed by his confederates and himself necessary to their success, through his betrayal of his trusts. The plaintiff conceived a scheme to wreck the vast interests which it was his duty to protect. He had acquired in his fiduciary capacity information through which the desired end could be reached. It was necessary for him to have confederates; that he should impart to them his secret information; that he should continue through the progress of the scheme to advise with and inform them of what from time to time became known to him; that his connection with them should be concealed from the courts to whose orders he was subject, and which had a right to rely upon his fidelity. Through a betrayal of his trust under such circumstances, according to his version of the facts, these vast railroad properties have been secured and a profit realized of possibly $15,000,000, or more.

His pretence now is that through betrayals of official and *quasi*-judicial trusts his confederates have amassed properties, monies, and values to a vast amount, with an understanding from the
112 beginning that they were to reward him for his betrayals by sharing with him one-sixth or some other portion of the spoils. They deny his averments, and he charges that they repudiate the fraudulent contract they made with him. As they do not divide the spoils, this suit is brought to compel them and the railroad defendant, as if by specific performance, to issue to him his proportionate shares of its capital stock, and also grant him proportionate parts of profits and gains, and also interests in undivided property yet remaining. This is a sad picture, and a strange demand to present to a court of equity. To what extent the alleged confederates are

blameworthy or culpable, if at all, could be made to appear only after answer and full proofs.

The court, however, must dispose of the case as now presented. A few days ago a demurrer interposed was overruled on the ground substantially that the theory of the bill was to require of the court the enforcement against the railroad defendant not only of a division of the alleged corrupt spoils, a part of which had passed
113 to the possession of the co-defendants, but of the remaining assets undivided; also a partition of property, &c., as just stated. Thus the powers of a court of equity were invoked to enforce the execution of a fraud on itself as a court as well as upon others. Surely no principle of equity, morals, or law can countenance such a demand, and no court worthy of its trust would lend its aid to further a scheme so abhorrent to all recognized rules of right and justice.

It is charged, however, and for the purposes of this case may be admitted, that Mr. Kennedy, agent of the Amsterdam committee, was advised by plaintiff during the progress of the scheme that he (the plaintiff) was secretly betraying his trust. If so, the gravity of plaintiff's offence was not lessened by thus adding a new confederate to his fraudulent plans, especially one whose relations were eminently fiduciary towards his principals, the Amsterdam committee, the court, and others interested.

Plaintiff's cause of action is based on inherent turpitude,
114 and hence the fundamental maxim applies, "*ex turpi causa*, &c.;" therefore, another maxim has potential force, viz., "*potior est conditio defendentis.*" In plain English, courts of equity will not recognize as valid or enforce any agreement grounded in turpitude; nor will it undertake to unravel a tangled web of fraud for the purpose of enabling one of the fraudulent parties, after such judicial disentanglement, to consum-ate his fraudulent designs.

The party complaining must come before the court with clean hands.

In this case he has not, by the averments of his bill, nor by his sworn testimony either, clean hands within the rules of equity, nor any cause of action which can be upheld without a flagrant violation of the most positive and clearly defined rules governing such cases.

The plea is sustained and the bill dismissed, with costs.

Nelson, district judge, concurs.

(Endorsed:) Filed July 15, 1882. H. E. Mann, clerk.

115 United States Circuit Court, District of Minnesota.

JESSE P. FARLEY, Pl'ff,

*vs.*

JAMES J. HILL, N. W. KITTSON, & THE ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY *Company*, Def'ts.

It is hereby stipulated and agreed that the deposition of the plaintiff, Jesse P. Farley, may be taken in the above-entitled action,

upon the issue upon the plea to the amended bill interposed by the def'ts, Hill & Kittson, before a notary public, at the office of Griffith & Knight, att'ys, at the city of Dubuque, Iowa, on the 15th day of March, 1882, upon oral interrogatories and cross-interrogatories, subject to exceptions thereto as incompetent, irrelevant, and immaterial.

Dated March 6, 1882.

GILMAN & CLOUGH &
GRIFFITH & KNIGHT,
*Solicitors for Pl'ff.*

R. B. GALUSHA,
GEO. B. YOUNG,
*Solicitors for Def'ts, Kittson & Hill.*

116 United States Circuit Court, District of Minnesota.

JESSE P. FARLEY
*vs.*
NORMAN W. KITTSON, JAMES J. HILL, and THE ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY CO., Def'ts.

Deposition of Jesse P. Farley, taken before me this 15th day of March, A. D. 1882, to be used on the trial of the above cause in behalf of plaintiff. Taken at the office of Griffith & Knight, in the city of Dubuque, Iowa, in pursuance of the annexed stipulation, there being present Hon. J. M. Griffith, on the part of plaintiff, & Hon. Geo. B. Young, on the part of defendants.

FRED. O'DONNELL,
*Notary Public.*

JESSE P. FARLEY, sworn:

Int. 1. Are you the plaintiff in this suit?

Ans. Yes, sir.

117 Int. 2. In your bill of complaint you allege, among other things, as follows:

"And your orator states that after said agreement between him and the said Kittson and Hill, and before the decrees of foreclosure in said suits, and before the said purchase of said bonds, or any of them, and while negotiations were pending for the purchase of the bonds represented by the said Kennedy, as aforesaid, he, the said plaintiff, informed the said Kennedy of his said interest and connection with the said Kittson & Hill in the project for the purchase of said bonds, and that the said Kennedy had full notice and knowledge that he was so connected therewith and interested therein, and fully approved and sanctioned the same."

State whether or not said allegation is true in fact.

Ans. It is true, sir; every word of it.

Int. 3. Have you in your possession any letter from the said Kennedy relating to the matter stated in the above question? If so, please produce it, that a copy thereof may be made by the notary in this your deposition.

118 Ans. Yes, sir; I have a letter, which I here produce.

(Copy of letter, which is Exhibit A.)

Confidential.

41 CEDAR STREET, NEW YORK, 25*th Feb'y*, 1878.

J. P. Farley, Esq., St. Paul, Minnesota.

DEAR SIR: We are in receipt of your favor of 22nd inst., and will send you the particulars you desire with pleasure, but two of our clerks are away sick, so that we are short-handed, and we will have to ask you to excuse us till to-morrow or next day. We think it will pay you to take an interest with K. & H., and we are glad to hear that they have offered it to you.

The purchase has now been concluded. We have so advised the committee at Amsterdam by cable to-day, and it will be publicly announced there to-morrow morning. The writer telegraphed you to-day, as trustee, to remit $4,800, to pay the interest due 1st March on the $120,000 issue of Branch Line bonds.

Yours, very truly,

JOHN S. KENNEDY.

119 Int. 4. Have you ever seen the said John S. Kennedy write, and do you know his handwriting?

Ans. Yes, sir; & know his handwriting.

Int. 5. State whether or not the body of said letter and the signature thereto are in his handwriting.

Ans. It is, sir; yes, sir.

Int. 6. Do you remember what you said to him, in your letter of 22nd Feb'y, 1878, referred to in the above letter, respecting your interest with Kittson & Hill in the purchase of any railroad bonds, if you said anything on that subject? If so, please state as fully as you can recollect.

(Obj. as incompetent, because calls for parol testimony of the contents of a written letter.)

Ans. This letter was in answer to a letter that I wrote him, on the subject of the purchase of the St. Paul & Pacific First Div. bonds and Extention Line bonds of the Dutch committee. I cannot state the words of my letter, but that was the meaning. I wanted
120 to know if Mr. Kennedy had any objection to it or not, knowing him to be the representative of said bonds in America. I mean I wanted to know if he had any objections to my being interested with Kittson and Hill in the purchase of said bonds.

7. Have you any copy of your letter to him to which this is a reply?

Ans. No, sir.

8. Do you know where your said letter to him now is, if in existence?

Ans. I do not know, sir.

9. If in your said letter to him you stated that you were, or had been, offered an interest by Kittson and Hill in the purchase, or in the enterprise of purchasing, the bonds mentioned above by you, state why you used the word "offered."

Ans. I was very desirous to get Mr. Kennedy's consent without letting him know that I was actually one of the parties that carried on all the negotiations, and should he have objected I might
121 have withdrawn without his knowing anything about it. I had said a great deal to Mr. Kennedy and Capt. Barnes, his partner, both as to the ability of Kittson & Hill to raise the money to pay for those bonds, and in all my conversations with them, Kennedy & Barnes, had failed to let them know that I had the same interest that Kittson & Hill had, although I knew it to be the fact.

10. In your said letter to John S. Kennedy did you mention the names of Kittson & Hill in connection with the enterprise of purchasing said bonds?

(Obj. same as last.)

Ans. I did.

11. To whom or what do the capital letters "K. & H." in this letter of John S. Kennedy refer?

(Obj. as incompetent.)

Ans. In that connection it means N. W. Kittson & James J. Hill.

12. Subsequent to the receipt of this letter from John S. Kennedy, did you have any conversation with him relative to
122 your connection with Kittson and Hill and interest in the enterprise of purchasing said bonds? If so, state when & where the conversation took place, who were present, and what was said.

Ans. I had a conversation with Mr. Kennedy in his private office, 41 Cedar street, New York, about my being interested with Kittson & Hill in the purchase of the bonds referred to. Mr. Kennedy made no objections, but rather seemed to be gratified. He thought it was a good thing for me, and only advised me to ascertain how much money it would be necessary for me to raise to carry out the project. To the best of my recollection this was in the month of April, or very early in May, 1878. No one was present but myself & Mr. Kennedy.

13. State whether the bonds were purchased before or after your letter to him of 22nd Feb'y, 1878, & his letter to you of 25th Feb'y, 1878?

(Obj., as it does not appear that the witness has any personal knowledge as to when the purchase was effected, but does appear that he was not present when the purchase was made, and
123 that he took no part in making it.)

Ans. I had no positive knowledge of the bonds being purchased until I received that letter from him, Mr. Kennedy; but when the contract was to be consummated in New York, Mr. Kittson was very anxious for me to be in attendance there; but other duties, and knowing what the provisions of the contract were very nearly, I didn't go on.

(Obj.. to all of answer following word Kennedy as incompetent & immaterial.)

14. In what month and year was it that Mr. Kittson wanted you to go to New York to be present at the consummation of the contract?

Ans. I have no exact data, but it was early in 1878.

15. Was it before you received this letter from John S. Kennedy?

Ans. My impression is it was after receiving the letter.

124 16. What Kittson do you mean?

Ans. I mean Norman W. Kittson.

17. Look at Question No. 90 in the deposition of James J. Hill, printed with other depositions in the case of H. Sahlgard *vs.* John S. Kennedy, in the U. S. circuit court for the district of Minnesota, and give the date of the agreement with the Dutch committee for the purchase of said bonds, as stated by the defendant, James J. Hill.

Ans. March 13th, 1878.

18. In your bill of complaint in this case you allege, among other things, as follows: "And your orator says that to all inquiries made by the said Kennedy or any of the trustees in said mortgages, or by any of the holders of any of the bonds secured thereby, or by any one interested in the property under his charge, as manager & receiver, he at all times gave full and true answers and information to the best and utmost of his knowledge and ability, and kept the said Kennedy fully informed of all facts, matters, & things coming

125 to his knowledge affecting said property, and in all things acted honestly and in good faith towards all persons interested in property under his control, as receiver and manager, as aforesaid." State whether or not said allegation is true in fact.

Ans. It is, sir.

Cross-examination:

Int. 1. On the 22nd of Febr'y, 1878, how long had negotiations been going on between Smith, Stevens, Kittson, & Hill, and the Dutch committee for the purchase of the bonds represented by the committee?

Ans. About one year, sir.

Int. 2. In these negotiations did J. S. Kennedy & Co. represent and act for the committee?

Ans. They did not take a very active part for a long time after the negotiations first commenced.

Int. 3. With whom was the negotiation first opened, with J.

126 S. Kennedy & Co. or the committee directly?

Ans. The first negotiation commenced in St. Paul with a member of the committee named John Carp, I think in Feb'y, 1877. Mr. Barnes, the partner of J. S. Kennedy, was in St. Paul at the time, but was very skeptical on the subject, and did not seem to want to have anything to do with it. Did not seem to think Kittson and Hill could raise the money. I was the first one who broached the subject to Mr. Carp. I made an appointment with Carp and took Mr. Kittson & Hill to Mr. Carp's room and introduced them to him.

Int. 4. Who first introduced Smith, Stephen, Kittson, & Hill, or any of them, to J. S. Kennedy & Co. as persons desiring to pur-

chase the bonds represented by the committee? State as far as you know.

Ans. I knew nothing about Mr. Steven or Mr. Smith, but I introduced Mr. Barnes, a partner of Kennedy, to Mr. Kittson & Hill about the same time they became acquainted with Mr. Carp.

127 It was in St. Paul.

Int. 5. Why did you not inform Mr. Kennedy of your interest with Kittson & Hill while the negotiations were going on that resulted in the purchase mentioned in Mr. Kennedy's letter of Feb'y 25th, 1878?

Ans. Because it was agreed between Kittson, Hill, & myself, for fear it might become public that I had an interest, and the attorneys for the stockholders would go to the court and have a receiver appointed and have me removed, & Mr. Kittson particularly said if that was the case he wouldn't give a d—n for the whole thing. He said so frequently, & he manifested a great deal of anxiety for fear Hill would let it be known that I was interested. By the word "thing," Kittson meant the purchase of the bonds and the acquisition of the property.

6. Then, you were apprehensive that if your interest in the project was brought before the court it might lead to your removal as receiver?

128 Ans. Yes, sir; an action of ejectment was already brought against the trustees.

7. Why didn't you tell Mr. Kennedy, in your letter of Feb'y 22nd, 1878, that you had been interested with Kittson & Hill from the beginning & during all the negotiations, instead of telling him that you had been offered an interest?

Ans. As before stated, I didn't wish him to know that I was interested unless it was agreeable to him; if not, I intended to get out of it the best way I could.

8th. In the conversation which you have stated you had with Mr. Kennedy in April or May, 1878, did you tell him that you had been interested from the beginning?

Ans. My impression is that from my conversation with him he would infer that I had been interested from the beginning.

9. Did you tell him so in so many words?

Ans. I do not recollect of having done so positively.

129 10. Was this conversation before or after you had applied to Judge Dillon, at Jefferson City, for leave to finish the extension lines and issue debentures for the cost of construction?

Ans. My impression is it was just before, when I was there purchasing cars and locomotives.

11. When did you first learn the terms of the agreement for the purchase of the bonds bearing date March 13th, 1878, & made between the Dutch committee and Smith, Stephen, Kittson, & Hill?

Ans. Well, I got news of that most every day from Kittson & Hill while I was in St. Paul how the thing was progressing.

12. When did you first see that agreement or a copy thereof?

Ans. It was a long time after it was consummated.

130 13. Why, after you had got Mr. Kennedy's letter of Feb'y 25th, 1878, didn't you have your name put into that agreement of March 13th, along with those of Smith, Stephen, Kittson, & Hill, if you were in fact equally interested with Kittson & Hill in that agreement?

Ans. The same cause still existed that my name was suppressed from the beginning—stockholders carrying on this war for the possession of the property.

14. When Senator Henderson came to St. Paul as a commissioner under Judge Dillon's order made on your application for leave to finish the extention lines and issue debentures, did you inform him that you were interested equally with Kittson & Hill, or interested at all under the agreement of March 13th, 1878?

Ans. I have no knowledge of the subject coming up at all in any way, shape, or form or manner.

131 15. You were present at Davenport, were you not, on May 31st, 1878, when the order of that date was there made by Judge Dillon authorizing you to go on and complete the extention lines with money to be furnished to you, as receiver, by Smith, Stephen, Kittson, & Hill?

Ans. I do not recollect the date, but no doubt I was there.

16. You heard that order read aloud at that time & place, did you not, by Judge Dillon as he drew it?

Ans. I do not recollect that particular circumstance, but I have no doubt it is so.

17. Don't you remember that the fact that Smith, Stephen, Kittson, & Hill had made that agreement & bought the bonds under it was talked over with Judge Dillon at the time the order was made and at previous hearings before him at Des Moines on your said application?

Ans. Yes, sir; I do. The money it was understood was to be raised by Mr. Stephen, but I recollect they were all parties to
132 the contract.

18. The second paragraph of that order reads: "Whereas George Stephen, Donald A. Smith, Norman W. Kittson, & James J. Hill represent & show to the court that they are the equitable owners of $11,400,000 of the $15,000,000 issue of bonds secured by the extensive mortgage of Ap'l 1st, 1871, as shown and set forth in an agreement between them, as parties of the first part, and" certain persons named "the committee of the Dutch bondholders of the St. Paul and Pacific Railroad Company, parties of the second part, being an agreement of twenty-seven articles, dated March 13th, 1878." Did you, at the time that order was made, or at any time, inform Judge Dillon that you were equally interested with Kittson & Hill under that agreement of March 13th, 1878, mentioned in that order?

Ans. I did not, sir.

19. Why did you not?

Ans. I did not think it was a matter that interested him at
133 all. I intended to go on and finish the road according to his order, if they furnished the money according to their agreement.

20. You have stated that the reason why your connection with the enterprise was kept secret was that, if it were known, the stockholders of the 1st div. comp'y would take steps to have you removed from the management of the lines of that comp'y by the court and a receiver appointed. Were you not also afraid that the United States circuit court, whose receiver you were of the extension lines, would also consider your interest in such a project a sufficient reason to remove you from your office of receiver?

Ans. Well, sir, we never thought much of the court unless somebody moved in the matter. I don't think that subject was ever mentioned between Messrs. Kittson, Hill, & myself.

21. But you thought that if it were generally known that you were interested with Kittson & Hill it might lead to your re-
134 moval as general manager of the 1st div. lines & the appointment of a receiver of those lines, and this aspect of the case was frequently considered between you, was it not?

Ans. Yes, sir; we were afraid the stockholders would move in the matter.

22. Then you were afraid their movement might succeed?

Ans. We didn't like to risk it, but it didn't keep me from administering the affairs of the comp'y fairly & honestly.

23. You have said that Mr. Kittson frequently said that if you should be so removed and a receiver appointed, he considered your whole enterprise would be worthless; did you share that opinion?

Ans. To some small extent.

24. Why couldn't the bonds be bought & used in paying for the property at a foreclosure sale, no matter who was general manager or receiver?

135 Ans. The past management of the property had been, in our opinion, so reckless and dishonest that if the stockholders got possession of it, even for only a few months, they could hide and steal everything that they could lay their hands on. A man only wants to look into the matter of the former management of the extension lines particularly to come to the same conclusion that we did.

25. Do you recollect what Judge Dillon said to you in my presence & that of Mr. Hill, at Davenport, just after signing the order of May 31st, 1878, in regard to your duties under that order, and what he expected of you, and what interests you were to represent?

Ans. I do not.

26. Don't you recollect that he said, "Now, Mr. Farley, I want you to remember that you are my man in this matter; you represent the court," and that he charged you to see to it that Smith,
136 Stepen, Kittson, & Hill fully lived up to & performed the conditions of that order?

Ans. He may have said so, but I was so familiar with what my duty was it is not very likely it would make a very strong impression on my mind.

27. And the fact that you were a partner & equally interested with those men whom you were thus to hold to account did not

make his remarks have any very strong impression on you—no stronger than they otherwise would have had?

Ans. I had a great deal of confidence in Judge Dillon & his desires to see this property properly administered. I also had a great deal of confidence in Mr. Stephen's ability to raise the money when I was told he would do it, and I looked upon the matter as being finally consummated, except to go on and complete the work, & I knew how to do that.

28. After this letter of Feb'y 25th, 1878, which is in evi-
137 dence, did you have any other letters from Mr. Kennedy or his firm in which reference was made to the ownership of the bonds purchased from the Dutch committee?

Ans. I don't recollect of any such language as that being used in the letters. I have received a great many letters from them in which the question of the bonds was mentioned, but I don't recollect if any reference to the ownership of them was made.

Counsel for defendants offer in evidence printed & certified copy of order of May 31st, 1878, marked "Exhibit B," referred to in cross-examination.

(Obj. as irrelavant and immaterial.)

J. P. FARLEY.

Subscribed & sworn to by J. P. Farley before me, this 15th day of March, 1882.

[SEAL.] FRED. O'DONNELL,
*Notary Public.*

138 In the Circuit Court of the United States for the District of Minnesota.

JOHN S. KENNEDY and others
*vs.*
THE SAINT PAUL AND PACIFIC RAILROAD COMPANY and others.

This cause having come on to be heard on the eighteenth day of April, A. D. 1878, at Jefferson City, in the State of Missouri, on the application of J. P. Farley, Esq., receiver of the defendant, The Saint Paul and Pacific Railroad Company, to be authorized to issue the debentures of said company for the purpose of constructing the uncompleted portions of said railroad and to sell lands pertaining to the completed portions thereof, and the court, for the purpose of fully advising itself in the premises, having then appointed a commission of examination to report all the facts necessary to enable the court to judge of such application, and said commission having so reported and the court being fully advised in the premises, it is hereby ordered:

139 That the order heretofore made in this cause on the first day of August, A. D. 1873, appointing a receiver for said company, and authorizing him, among other things, to issue certain debentures, as modified by an order made herein on the first day of

September, A. D. 1873, be further modified and supplemented as follows:

I. Said receiver shall issue no debentures, in addition to those already issued, except as hereinafter provided, and only when specially ordered by the court to do so; but those already issued shall continue to have the liens and preferences heretofore secured to them by the orders of this court.

II. Whereas George Stepen, Donald A. Smith, Norman W. Kittson and James J. Hill represent and show to the court that they are the equitable owners of $11,400,000 of the 15,000,000 issue of bonds secured by the extention mortgage of April 1, 1871, as shown and set forth in an agreement between them, as parties of the first part, and Chemet & Weetjen, Kirkhoven & Co., Lippman, Rosenthal & Co., Wurfbain & Son, Tutein, Nolthenvier & De Hann, H. C.
140 Voorhoeve & Co., and John Carp, the committee of the Dutch bondholders of the Saint Paul and Pacific Railroad Company, parties of the second part, being an agreement of 27 articles, dated March 13, 1878, and which said $11,400,000 of bonds are held by John S. Kennedy & Co. (the plaintiffs herein), as trustees, as shown in said agreement; and whereas the said Stephen, Smith, Kittson, & Hill propose to advance and furnish, or cause to be advanced and furnished, the full sum necessary to complete and equip the said extension lines to St. Vincent, and from Melrose at least to Fergus Falls, as required by the act of the Legislature of the State of Minnesota, approved March 9th, 1878, in time to save the forfeiture therein provided for, and to secure the land grant to the company, if the court will, in this cause, authorize the receiver to construct and equip the said extention lines on such terms and on the security of such liens as will be equitable to themselves, and as between themselves and other bondholders and all others concerned in the property and the said mortgage; and whereas it appears that no foreclosure of said mortgage can be had in time to prevent the forfeitures provided for in said act of the Legislature of the
141 State of Minnesota, and that if the said forfeitures are made the security of the said mortgage will be, as to the unfinished lines, wholly destroyed; and whereas the orders hereinafter made are based upon fundamental consideration and condition that money enough shall be advanced to the receiver fully to build and equip the said extension lines as aforesaid; and whereas the court has refused to issue debentures as a means of credit in advance of actual construction, or to allow the receiver to incur any indebtedness on his part, as receiver, beyond the money actually advanced:

Now the said receiver, out of moneys so to be furnished him, and not otherwise, is hereby authorized to proceed to construct and equip the said extention lines at the lowest possible expense and cost in cash, of which he shall keep an exact and minute account, and make monthly reports to the court, and in no event to exceed the rate of ten thousand dollars per mile for such construction, including necessary sidings, station buildings, water tanks, &c., & a sufficient equipment for the business of said lines.

142 When the said extension lines are fully completed in such manner as to secure and receive the land grant and equipped for business and ready to run, the receiver will be authorized to issue, in such form as the court shall then direct, debentures for the actual sums of money so advanced to him by the said Stephen, Smith, Kittson, and Hill, payable in gold coin of the present standard of weight and fineness established by law, with interest at the rate of eight per cent. per annum, which debentures shall include interest at said rate on all sums so advanced to the receiver from the date of such advances, and which debentures shall be a first lien on all the lines of road not now completed, and on all the lands which such completion shall be the means of earning and acquiring, but not a lien on the lines of road already completed, or on the lands already earned, unless the court shall then so order and adjudge; and the right and power are hereby reserved to extend the lien of the said debentures over the lines already completed, and to the lands already earned and acquired and now owned by the company, if to the court it shall appear, upon the completion of the said extension
143 lines to St. Vincent and to Fergus Falls, that such extension of the lien of such debentures is just and equitable.

Notwithstanding the foregoing order in respect of debentures and the lien thereof, on the completion of the road in running order to St. Vincent, and as far as Alexandria, the court reserves the right to issue debentures for the cost of such completion, and will issue the same if the said committee of Dutch bondholders shall consent thereto, and if no good reason shall be shown or exist for not then issuing such debentures.

III. Any bondholder under the $15,000,000 mortgage aforesaid is hereby accorded the right at any time before the issue of debentures, and, if the court shall think just, at any time before the sale of the property under the decree of foreclosure, to pay his *pro rata* share of the necessary cost of the construction and equipment of the road under this order, and, on placing himself in this regard upon the same footing as the said Stepen, Smith, Kittson, and Hill, shall be entitled to have equal rights with them in respect of said debentures and the lien thereof; and power to make provisions in detail to secure this right is hereby reserved.

144 IV. It is expressly ordered that the receiver shall contract no debt under this order in excess of money actually received by him. Subject to this provision the receiver is authorized to purchase all necessary material, to employ all necessary agents and servants, and to make all contracts necessary for the purposes aforesaid; but no contractor under or other creditor of the receiver shall have any lien for work or material furnished the receiver under any lien law of the State of Minnesota, or otherwise.

V. The said Stephen, Smith, Kittson, and Hill shall jointly and severally execute an instrument approving of this order and agreeing to furnish all the money herein contemplated, which shall stand as a security for any contractor or laborer under the receiver who shall or may be injured by their failure to comply herewith, and agreeing to procure within sixty days the formal and duly authen-

ticated assent of the said Dutch committee to this order; and the said instrument shall be filed in this cause.

VI. The receiver shall cause all inspections and other pro-
145 ceedings to be had necessary to be taken to secure the acceptance of said roads by the State of Minnesota, as constructed in compliance with the acts of Congress and of said State, and to secure the conveyance to said company of the lands pertaining to such extention lines.

VII. Before this order shall take effect there shall be filed in this court the duly authenticated assent to its provisions of the new trustees of said $15,000,000 mortgage, and of John S. Kennedy and John S. Barnes, the trustees named in said agreement between said Stephen, Smith, Kittson, and Hill and said Dutch committee, and the approval in writing of the terms hereof by Messrs. John B. Henderson and T. C. Reynolds, the commission appointed by said order of April 18, 1878.

VIII. And it is further ordered that the said Kennedy and Barnes, the plaintiffs herein and trustees as aforesaid, shall not part with the possession of said $11,400,000 of bonds, or any of them, without the special order of the court; and that a copy of this order be served
on the Mercantile Safe Deposit Company, in the city of New
146 York, and proof of service by some disinterested person shall be filed in this cause.

IX. It is further ordered that the application of the receiver for leave to sell lands be continued for further consideration; and the power is reserved to modify the provisions of this order and to make further orders from time to time.

The clerk is ordered to make a complete record of the petition of the receiver, the order to show cause thereon, the order of April 18, 1878, and the separate and joint reports of the commissioners named therein (except the map appended to the report of Mr. Reynolds and the copy of the act of the Legislature of March 9, 1878), and of this order.

Thus made and ordered this 31st day of May, A. D. 1878.

JOHN F. DILLON, *Judge.*

147 UNITED STATES OF AMERICA, } ss:
*District of Minnesota,* }

I, H. E. Mann, clerk of the circuit court of the United States of America for the district of Minnesota, do hereby certify that I have carefully compared the foregoing copy with the original thereof, which is in my custody as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at St. Paul, in said district, this 13th day of March, A. D. 1882.

[SEAL.]

H. E. MANN, *Clerk,*
By O. J. REYNOLDS, *Deputy.*

148 UNITED STATES OF AMERICA, )
*District of Minnesota,* ) *ss:*

I, Fred. O'Donnell, a notary public in and for Dubuque county, Iowa, do hereby certify that the foregoing deposition of Jesse P. Farley was taken at the time & place & pursuant to the stipulation hereto annexed.

And I further certify that I was attended by the parties and their counsel at the time and place as stated in the caption and said deposition, and by the said witness therein named, and that the said witness, being of sound mind and of lawful age before the commencement of the taking of his deposition by me — duly and publicly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, and was carefully examined, and that the deposition as given was reduced to writing by myself in the presence of such witness and the said counsel, and from the statements of the witness, and that the deposition of such witness when completed was by me carefully read over to such witness and subscribed by such witness in the presence of such of said counsel and parties in said cause as were in attendance.

And I further certify that the exhibits attached to said deposition are the ones referred to therein, and that in the caption and said deposition is contained a complete record of all the proceedings before me at the time of taking the same; that I have retained the said deposition in my possession until I could deliver the same to the court in which said action is pending, or seal the same up and deposit it in the post-office, directed to said court.

149 And I do further certify that I am not of counsel or attorney for either of the parties to said cause, nor in anywise interested in the event thereof.

In testimony whereof I have hereunto set my hand, this 17th day of March, A. D. 1882.

[SEAL.] FRED. O'DONNELL,
*Notary Public of Iowa, in & for Dubuque Co.*

Fees:

| | |
|---|---|
| 1 day's attendance | $3 00 |
| Oaths to 1 witnesses | 10 |
| 30 folios of testimony | 6 00 |
| 1 exhibits certified | 25 |
| Postage | 25 |
| Total | $9 60 |

[Endorsed:] United States circuit court, district of Minnesota. Jesse P. Farley *vs.* James J. Hill *et al.* Depositions on the part of the plaintiff, taken, *de bene esse*, before Fred. O'Donnell, notary public, Dubuque, Iowa. Filed March 18, '82. H. E. Mann, clerk, by O. J. Reynolds, deputy.

150 U. S. Circuit Court, District of Minnesota.

JESSE P. FARLEY *v.* N. W. KITTSON, J. J. HILL, & *al.*

It is stipulated that all the averments of the plea to the amended bill down to and including the words "and has not yet settled his final accounts as such" are true as therein stated; and further, that the original and supplemental bills in the suit of J. S. Kennedy & *al. vs.* The St. Paul & Pacific R. R. and others and the order of this court dismissing the supplemental bill be deemed to be and are in evidence, and control the amounts of the bill and plea in respect to the purpose of said suit.

This stipulation is made merely for the purposes of the hearing on the plea.

July 3, '82.

R. B. GALUSHA,
GEO. B. YOUNG,
*Solicitors for Def'ts, Kittson & Hill.*
GILMAN & CLOUGH,
GRIFFITH & KNIGHT,
C. K. DAVIS,
*Solicitors for Pl'ff.*

151 BIGELOW, FLANDRAU & CLARK,
*Solicitors for Def't R'y Co.*

152 To the honorable the judges of the circuit court of the United States for the district of Minnesota, sitting in equity:

The bill of complaint of John S. Kennedy, Henry M. Baker, and John S. Barnes, each of the city & State of New York and a citizen of said State, suing on behalf of themselves and all other bondholders under the mortgages hereinafter mentioned who may come in and seek relief by and contribute to the expenses of this suit, complainants, against The Northern Pacific Railroad Company, a corporation created by and under the laws of the United States for the purpose of constructing, and engaged in constructing, a railroad in the State of Minnesota, and having in said State an office and officers for the transaction of its principal business; The St. Paul and Pacific Railroad Company and the First Division of the St. Paul and Pacific Railroad Company, each a corporation created and existing by and under the laws of the State of Minnesota and each transacting its business in and a citizen of said State; Walter L. Cutting, of

153 the city & State of New York and a citizen of said State, trustee under the mortgage for $120,000 hereinafter described; Russel Sage and Samuel J. Tilden, each of the city and State of New York and a citizen of said State, trustees under the mortgage for $700,000 hereinafter described; Edmund Rice and Horace Thompson, each of St. Paul, in the State of Minnesota, and each a citizen of said State, and the said Samuel J. Tilden, trustees under the mortgage for $1,200,000 hereinafter described; and George Y. M. Davis, of the *of the* city & State of New York and a citizen of said State, and said Horace Thompson and George L. Becker, of St. Paul, in

the State of Minnesota, and a citizen of said State, trustees under the mortgage for $2,800,000 hereinafter described; and John P. Yelberton, of the city and State of New York and a citizen of said State, and said Samuel J. Tilden, trustees under the mortgage for $1,500,000 hereinafter described; and the said Edmund Rice, Horace Thompson, and Samuel J. Tilden, trustees under the mortgages for $3,000,000 firstly hereinafter described; and the said George L. Becker, Horace Thompson, and Samuel J. Tilden, trustees under the mort-
154 gage for *for* $6,000,000 hereinafter described; and William G. Moorhead, of Philadelphia, in the State of Pennsylvania, and a citizen of said State, and the said George L. Becker and Horace Thompson, trustees under the mortgage for $3,000,000 secondly hereinafter described; and the said Horace Thompson, George L. Becker, and William G. Moorhead, trustees under the mortgage for $15,000,000, called the extension mortgage, hereinafter described, humbly showeth unto your honors:

That the Northern Pacific Railroad Company is a corporation created and existing under the laws of the United States. That the St. Paul and Pacific Railroad Company is a corporation created by and existing under the laws of the State of Minnesota; and that the First Division of the St. Paul and Pacific Railroad Company is another corporation created by and existing under the laws of the State of Minnesota, namely, the act of February 6, 1864, and other statutes, and as hereinafter stated. That said First Division of the St. Paul and Pacific Railroad Company owns and holds the
155 line of railroad from St. Anthony to Breckenridge, commonly known as, and hereinafter called, the Main Line, and the equipment thereof, and the land grant pertaining thereto; and also the railroad from St. Paul, via St. Anthony, to Watab, commonly known as, and hereinafter called, the Branch Line, and the equipments thereof, and the land grant pertaining thereto.

That the said St. Paul and Pacific Railroad Company owns and holds the line of railroad from Watab to Brainard, commonly known as, and hereinafter called, Brainerd Extension, a distance of about sixty miles, and also the line of railroad from St. Cloud to St. Vincent, a distance of about 310 miles, commonly known as, and hereinafter called, the St. Vincent Extension, and the land grant pertaining thereto; all of which is more fully hereinafter stated. That bonds under and in pursuance of said mortgages hereinafter mentioned and secured thereby have been issued, and are now held to the following amounts or thereabouts, namely, on the Branch mortgages, $2,750,000; on the Main Line mortgages, $8,950,000; and on the Extension mortgages, $10,700,900, as more particularly
156 hereinafter stated. That the plaintiffs are the holders of some of the bonds issued under each of said mortgages, except the first two on the Branch Line and the first and last on the Main Line, and numerous other persons are holders of other like bonds so issued, and the plaintiffs bring this action for the benefit of all said bondholders who may come in and share the costs and expenses of this suit, and such holders are very numerous and of divers places of

residence, and it is impracticable to make them all parties to this action.

And your orators further allege that by an act of Legislature of the State of Minnesota, approved March 10, 1862, entitled "An act to facilitate the construction of the Minnesota and Pacific railroad, and to amend and continue the act of incorporation relating thereto," the defendant, The St. Paul and Pacific Railroad Company, was organized; that in and by said act the said last-named defendant was authorized and empowered to construct and operate a line of railway from Stillwater via St. Paul, St. Anthony, and Min-
157 neapolis to the town of Breckenridge, on the Sioux Wood river, with a branch from St. Anthony via Anoka, St. Cloud, and Crow Wing to St. Vincent, near the mouth of the Pembina river; that by said act there was granted to the said last-named defendant, to aid in the construction of its said main and branch lines of road, six full sections of land for each and every mile thereof, which lands had before that time been granted to the late Territory of Minnesota by an act of Congress entitled "An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of railroads in said Territory, and granting public lands in alternate sections to the State of Alabama to aid in the construction of a certain railroad in said State, and granting certain lands to railroad companies, therein named," approved March 3, 1857; that said grant of lands to said defendant was upon the conditions in said acts prescribed; to which acts, for greater particularity, reference is hereby had; that after the organization of the last-named defendant as aforesaid, and on or about the March 11, 1862, the said last-named defendant duly issued, negotiated, and for value transferred its negotiable bonds or writings obliga-
158 tory to the amount of the sum of one hundred and twenty thousand dollars ($120,000), and as the security for the payment of the same on or about the day last aforesaid executed, acknowledged, and delivered to one Walter L. Cutting, as trustee, its trust deed or mortgage of all that part of its said line of railroad which extends from the Mississippi river, in St. Paul, to St. Anthony, including the principal depot at the latter-named place; that said mortgage was, soon after its delivery, duly recorded, in accordance with the laws of Minnesota; that none of said bonds so secured thereby have been paid, discharged, or cancelled, except as hereinafter stated; and that said mortgage still stands as an encumbrance upon the property conveyed thereby, except as hereinafter stated.

And your orators further allege that afterwards and on or about the 2nd day of June, 1862, the said last-named defendant, for the professed purpose of enabling it to raise funds wherewith to complete and equip so much of its said branch line of road as extends from St. Anthony to Watab, a distance of eighty (80) miles
159 from St. Paul, issued, transferred, and for value negotiated its negotiable bonds or writings obligatory to the further amount of the sum of seven hundred thousand dollars ($700,000), and, as security for the payment of the same, on or about the day

last aforesaid executed, acknowledged, and delivered in due form of law to Russell Sage and Samuel J. Tilden, as trustees, its trust deed or mortgage of all that part of its said main line of road which extends from St. Paul to St. Anthony, and of all its said branch line of road extending from St. Anthony to Watab, together with all the franchises, equipments, and appurtenances thereto belonging; that said mortgage was, soon after its delivery, duly recorded, in accordance with the laws of Minnesota; that none of the said bonds so secured thereby have been paid, discharged, or cancelled, except as hereinafter stated; and that said mortgage still stands as an encumbrance upon the property conveyed thereby, except as hereinafter stated.

And your orators further allege that afterwards and on or about the 2nd day of June, 1862, the said last-named defendant, for the professed purpose of enabling it to raise funds wherewith
160 to construct and complete its said branch to Watab, issued, negotiated, and for value transferred its negotiable bonds or writings obligatory to the further amount of the sum of one million two hundred thousand dollars ($1,200,000), and, as security for the payment of the same, on or about the day last aforesaid executed, acknowledged, and delivered in due form of law to Edmund Rice, Horace Thompson, and Samuel J. Tilden, as trustees, its trust deed or mortgage of that part of its said main line of road extending from St. Paul to St. Anthony, and of that part of its said branch line of road extending from St. Anthony to Watab, together with all its equipments and appurtenances; and also all the lands pertaining to such parts of its said main and branch lines of road as it had derived from said act of Legislature and said act of Congress, being three thousand eight hundred and forty acres per mile, and in all three hundred seven thousand two hundred acres; that such mortgage was, soon after its delivery, duly recorded in accordance with the laws of Minnesota; that none of said bonds so secured
161 thereby have been paid, discharged, or cancelled, except as hereinafter stated, and that said mortgage still stands as an encumbrance upon the property conveyed thereby, except as hereinafter stated. And your orators further allege that after the issuance of all the bonds aforesaid and the execution and delivery of said mortgages, to wit, on or about the 6th day of February, 1864, the defendant, the First Division of the St. Paul and Pacific Railroad Company, was organized and became a corporation under and by virtue of an act of Legislature of the State of Minnesota entitled "An act to amend the charter of the St. Paul and Pacific Railroad Company" and of acts duly performed thereunder, and on or about the day last aforesaid acquired & became the owner of all the property, franchises, and interests of the defendant, The St. Paul and Pacific Railroad Company, belonging to its said lines of road from St. Paul to Watab, and from St. Anthony to a point between the foot of Big Stone Lake and the mouth of Sioux Wood river, together with the lands granted as aforesaid for the construction of said lines of road.

162 And your orators further allege that afterwards, and on October 1, 1865, the defendant, the First Division of the St. Paul and Pacific Railroad Company, for the professed purpose of retiring and recalling all the bonds aforesaid and consolidating its bonded indebtedness pertaining to said line of road from St. Paul to Watab, and for the further professed purpose of procuring funds to complete and equip such line of road, issued its negotiable bonds or writings obligatory for the further amount of two millions eight hundred thousand dollars ($2,800,000), and, as security for the payment of the same, on or about the day last aforesaid executed, acknowledged, and delivered, in due form of law, to George S. Becker, Horace Thompson and George T. M. Davis, as trustees, its trust deed or mortgage of all said line of road from St. Paul to Watab, commonly known as the Branch Line, and all property, franchises, and interest pertaining thereto, and all the laws granted as aforesaid to aid the construction thereof, except one hundred and
163 twenty sections before that time conveyed to one Winter; that said mortgage was, soon after its delivery, duly recorded, in accordance with the laws of Minnesota; that it was expressly provided in and by said mortgage that of the bonds secured thereby the amount of two millions and twenty thousand dollars ($2,020,000), being the aggregate amount of said three prior issues of bonds, should be retained by said trustees until the surrender of the bonds of the prior issues; that, in pursuance of the scheme contemplated by the said last-named mortgage, the greater part, as your orators are informed and believe, of the bonds of said three prior issues were retired, but as to the precise number left still outstanding your orators cannot state; and your orators further state that nearly or quite all the bonds secured by said last-mentioned mortgage have been actually negotiated and transferred for value and are yet outstanding, and said mortgage is an encumbrance to the amount thereof upon the property conveyed thereby.

And your orators state that of said four issues of bonds
164 pertaining to said branch line from St. Paul to Watab there are now outstanding, in the aggregate, two millions seven hundred and fifty thousand dollars.

And your orators further allege that heretofore, and on or about March 1st, 1864, the defendant, The First Division of the St. Paul and Pacific Railroad Company, for the professed purpose of raising funds to construct its said line of road from St. Anthony to a point near the foot of Big Stone Lake, commonly known as the Main Line, issued & negotiated, as hereinafter stated, its negotiable bonds or writings obligatory to the amount in the aggregate of one million five hundred thousand dollars, and, as security for the payment of the same, on or about the day last aforesaid executed, acknowledged, and delivered, in due form of law, to Samuel J. Tilden and John P. Yelverton, as trustees, its trust deed or mortgage of one hundred and fifty miles in extent, from St. Anthony toward a point near the foot of Big Stone Lake of its said line of road, commonly known as the Main Line, together with all the property and franchises appertain-

ing thereto; that said mortgage, soon after its delivery, was
165 recorded in accordance with the laws of Minnesota, and still remains a valid encumbrance to the amount of the bonds secured thereby upon all the property thereby conveyed, said bonds all being yet outstanding, as hereinafter stated.

And your orators further state that afterwards, and on the day last aforesaid, for the professed purpose of constructing and completing its said main line of road for the distance aforesaid, the defendant, The First Division of the St. Paul and Pacific Railroad Company, issued, negotiated, and for value transferred its negotiable bonds, or writings obligatory, to the further amount in the aggregate of three millions of dollars ($3,000,000), and as security for the payment of the same executed, acknowledged, and delivered in due form of law to Edmund Rice, Horace Thompson, and Samuel J. Tilden, as trustees, its trust deed or mortgage of said one hundred and fifty miles in extent from St. Anthony towards a point near the foot of Big Stone Lake of its said line of road, commonly known as the Main Line, together with all the property and franchises pertaining
166 thereto, and of all the lands granted as aforesaid to aid in the construction of said extent of said main line, being in all five hundred seventy-six thousand acres, or six sections to each mile; that said mortgage soon after its delivery was recorded in accordance with the laws of this State; that the bonds thereby secured are all yet outstanding, and said mortgage remains a subsisting encumbrance to the amount of such bonds upon the property thereby conveyed.

And your orators further state that afterwards, and by an act of Congress entitled "An act extending the time for the completion of certain land grant railroads in the States of Minnesota and Iowa, and for other purposes," approved March 3rd, 1865, the defendants, the said railroad companies, became entitled to ten sections of lands per mile, to aid in the construction of their said respective lines of road, including said six sections per mile originally granted, as hereinbefore stated.

And your orators further state that after the passage of said act of Congress, and on or about the 1st day of July, 1868, the defendant, The First Division of the St. Paul and Pacific Railroad
167 Company, for the professed purpose of completing its said main line from St. Anthony to Breckenridge, a distance of two hundred and ten miles, issued, negotiated, and for value transferred its negotiable bonds or writings obligatory to the further aggregate amount of six millions of dollars ($6,000,000), and as security for the payment thereof executed, acknowledged, and delivered in due form of law its trust deed or mortgage to George L. Becker, Horace Thompson, and Samuel J. Tilden, as trustees of all its said main line of road between said named points, together with all the property and franchises pertaining thereto, and all the lands granted as aforesaid to aid in the construction of such main line of road, being ten sections to each mile thereof; that said mortgage was recorded soon after the delivery thereof, in accordance with the laws of Minnesota; that the greater part of said bonds secured

thereby are yet outstanding, and said mortgage still stands as a subsisting encumbrance to the amount of said bonds upon the property thereby conveyed. That said last-named mortgage and said
168 issue of bonds thereunder covered and included said issue of bonds to the amount of one million five hundred thousand dollars, secured by the said mortgage of March 1st, 1864, and the said one million and five hundred thousand dollars issue of bonds were transferred to the trustees in said six million mortgage for the benefit of the holders of the bonds secured thereby, as collateral security; and that said one million five hundred thousand dollars of bonds are not now outstanding for any other purpose.

And your orators further state that under said three-million-dollar mortgage and under said six-million-dollar mortgage there are now outstanding bonds in the hands of *bona fide* holders to the amount of eight millions nine hundred and fifty thousand dollars.

And your orators further state that afterwards and on Dec. 1, 1870, the defendant, The First Division of the St. Paul and Pacific Railroad Company, executed, acknowledged, and delivered in due form of law to George L. Becker, Horace Thompson, and William G. Moorhead, as trustees, its trust deed or mortgage of its
169 said main line from St. Anthony to Breckenridge, and of the lands granted as aforesaid to aid in the construction thereof, to secure the payment of a further issue of bonds to the amount of three millions ($3,000,000) of dollars; that said mortgage was recorded in accordance with the laws of Minnesota soon after its execution; that one and a half millions of dollars of said bonds in said mortgage described were transferred by said First Division Company to one E. D. Litchfield in payment to him for certain stock by him held in said First Division of the St. Paul and Pacific Railroad Company, and transferred to the Northern Pacific Railroad Company or its officers, and that no other of said series of bonds have ever been issued, and that said transfer of bonds to said Litchfield was made by said First Division Company, and taken by said Litchfield with intent to defraud the creditors of such company.

And your orators further allege that by an act of Congress, approved March 3, 1871, entitled "An act authorizing the St.
170 Paul and Pacific railroad to change its lines in consideration of a relinquishment of lands," it was provided that the defendant, The St. Paul and Pacific Railroad Company, might so alter its branch lines as to locate and construct a continuation of its said branch line running up the Mississippi river from Crow Wing to Brainerd, there to intersect with the Northern Pacific railroad, and a second branch line running from St. Cloud via Otter Tail Lake or Rush Lake to St. Vincent, with the same proportionate grant of lands to aid in the construction thereof as had been before that time granted by said prior acts of Congress.

That said First Division of the St. Paul and Pacific Railroad Company, hereinafter called the First Division Company, on or about the 1st day of April, 1871, entered into an agreement with said St. Paul and Pacific Railroad Company, hereinafter called the St. Paul Company, whereby the First Division Company agreed to equip and

construct said St. Vincent and Brainerd Extension, and to take
171 a lease thereof for a term of ninety-nine years, and to make the bonds provided for by the extension mortgage referred to in said contract, and dispose of said bonds, and with the proceeds thereof pay for said construction and equipment, copies of which contract and lease, signatures & certificates of acknowledgement omitted, are herewith annexed, marked Exhibit "A" & "B," and made part of this bill.

That in pursuance of such contract and arrangement, the defendant, The St. Paul and Pacific Railroad Company, in April, 1871, executed, acknowledged, and delivered in due form of law to Horace Thompson, George L. Becker, and William G. Moorehead, as trustees, its trust deed or mortgage to secure the payment of fifteen millions dollars of bonds to be issued by said First Division Company, as provided in said contract, upon the property, lands, purchases, and interests therein described, a true copy of which mortgage, save the seals & signatures of the parties and witnesses thereto, and save the official certificate of the acknowledgments thereof, is hereunto
172 annexed, marked "Exhibit C."

And your orators allege that said mortgage, soon after its delivery, was duly recorded, in accordance with the laws of the State of Minnesota; that there have been issued, negotiated, and for value transferred, and are now actually outstanding in the hands of *bona fide* holders, bonds described in & secured by said mortgage to the amount of ten millions seven hundred thousand dollars.

That the said mortgage, contract, and lease were all executed at the same time & constituted one transaction.

That the said St. Paul Company had no property whatever, except the franchise to build said extension lines, and, by building the same, the right to secure the lands granted by Congress to aid in the construction of the same, at the rate of ten sections per mile; that by the construction of said extension lines said company would become entitled to 2,368,000 acres of land under said grant; that the security of the bondholders under said extension mortgage
173 depended entirely upon the construction of said extension lines, and that, in order to secure the lands under the Congressional grant, it is necessary that said lines shall be fully constructed by the 3rd day of December, 1873; that all of the bonds issued under said extension mortgage were solely for the purpose of raising means to complete said lines, and were negotiated upon the faith of the proceeds being so applied and the faithful execution of said agreement and the provisions of said mortgage in respect thereto.

That the First Division Company did accordingly receive the proceeds of said $10,700,000.00 of said extension mortgage bonds, to wit, $800,000.00, and also the further sum of $900,000.00 as an advance on 4,270 of said bonds not sold, but left in pledge to secure such advance.

And your orators further allege that default has been made in the conditions of said mortgage on the part of the said defendants, The St.

Paul and Pacific Railroad Company and the First Division of
174 the St. Paul and Pacific Railroad Company, among other things, in these, that the said companies have failed, refused, neglected, and are unable to construct or complete said lines of road in said mortgage described, as in and by said contract mortgage and the bonds issued thereunder they covenanted and agreed to do; a more particular statement of which failure, refusal, neglect, and inability is elsewhere in this bill more fully set forth; and that the said companies have failed and refused to faithfully and diligently use and apply the net proceeds of the bonds negotiated and issued as aforesaid in the construction and equipment of said lines of railroad in said mortgage described, but, on the contrary, have wrongfully and in fraud of the rights of the holders of the bonds so negotiated divested the greater part of the proceeds of the said bonds to other purposes, a more particular statement of which wrongful and fraudulent diversion of said proceeds is elsewhere in this bill more fully set forth.

That said First Division Company, by William G. More-
175 head, its construction agent, on the 2nd day of October, 1871, entered into a contract with C. A. D- Graff, W. Crooke, and Nicholas De Graff, partners under the firm name of De Graff & Co., for the construction by said firm of that portion of the branch line of the St. Paul and Pacific railroad, extending from St. Paul up the Mississippi river, included between Sauk Rapids village and Brainerd, a distance of about sixty-one (61) miles. That the said firm by said contract agreed to complete such portion of said branch line on or before June 1, 1872; and the said company by said contract agreed on its part to pay the said firm on the 15th day of each month for said work as the same should progress, upon estimates of the amount thereof made & furnished as in said contract specified, excepting & reserving ten per centum until the completion of the work, and agreed to furnish for such construction all iron, rails, splices, bolts & spikes, frogs and switches, as the same should be needed.

And your orators further allege that on October 5, 1871, the said First Division of the St. Paul and Pacific Railroad Company, by its said construction agent, entered into a further contract with said
De Graff & Co. for the construction of the line of road
176 of such company running from St. Cloud to St. Vincent, commencing at the west end of the bridge spanning the Mississippi river, to be located at or near St. Cloud, and terminating at a point one hundred and thirty miles or thereabouts from such point of beginning, being at the crossing of the Northern Pacific railroad; that said firm by such contract agreed to complete such portion of said line of road on or before March 1, 1873, and the said company, on its part, by such contract agreed to pay said firm on the 15th day of each month for such work, as the same should progress, upon estimates to be furnished in the manner in such contract specified, saving and reserving until the final completion of the work ten per centum of the amount thereof, not exceeding in the aggregate fifty thousand dollars, and further agreed to furnish for such construction

all iron, nails, splices, bolts, frogs, and switches as the same should be needed.

And your orators further allege that on the 5th day of October, 1871, the said First Division of the St. Paul and Pacific Company, by its said construction agent, entered into a further contract with said De Graff & Co. for the construction of that part of said
177 line of road last mentioned, commencing at a point at the crossing of the Northern Pacific railroad and extending to Pembina, a distance of two hundred (200) miles or thereabouts; that said firm by said contract agreed to complete such portion of said line on or before March 1st, 1873, and the said company, on its part, by said contract agreed to pay said firm on the 15th day of each month for said work, as it should progress, upon estimates to be furnished, as in said contract set forth, excepting and reserving ten per centum until the final completion of the work, not exceeding fifty thousand dollars, and to furnish for such construction the necessary iron, nails, spikes, bolts, frogs, and switches as the same should be needed.

That under and by virtue of their said contracts with De Graff & Co., and pursuant to the terms thereof, they, the said De Graff & Co., commenced the construction of said extension lines and continued the work thereon until the 15th day of October, 1872, at which time the said First Division Company having failed to make to
178 said contractors payments according to the terms of their said contract, the said contractors, because of such failure, suspended work under said contract and have never since resumed such work, and no further attempt has been made to construct said extension lines; that said First Division Company is still indebted to said contractors in the amount of five hundred thousand dollars for work done by them under said contracts; that for the work done by said contractors under said contracts said company paid them in cash one million two hundred and fifty thousand dollars, and no more, and after such suspension of work it turned over to them, in part payment of the amount it then owed them, iron which it had purchased and then had, to be used in constructing said extensions, to the amount in value of two hundred and two thousand dollars.

That prior to such suspension said First Division Company purchased with the proceeds of bonds issued under said extension mortgage all the iron necessary for the construction of said extensions, and used so much thereof as was needed in the construction of the parts of said extension which have been completed,
179 and the balance thereof, except that turned over to DeGraff & Co., as aforesaid, the said company has sold or hypothecated for very nearly its full value to secure debts incurred or loans negotiated by it. That the value of the iron so sold or hypothecated was at least one million seven hundred thousand dollars.

That the costs of the materials by said company actually applied to the construction of said extensions did not exceed one million seven hundred thousand dollars, and that said company has not expended towards the construction of said extension, in addition to the payments so made to said DeGraff & Co. and the costs of said

materials, a greater amount than one hundred thousand dollars; and all the proceeds of said bonds sold as aforesaid and of said advance of nine hundred thousand dollars, except as above stated, have been wrongfully and illegally appropriated to other purposes than the construction or equipment of said extensions.

That of said extension said company has completed only one hundred and thirty-nine miles, to wit, from St. Cloud westward for a distance of thirty-five miles; & from the intersection of said
180 St. Vincent extension with the line of the Northern Pacific railroad near Glyndon southward twelve miles; and from said intersection northward ninety-two miles; all on the line of the St. Vincent Extension.

That of said extension there now remains uncompleted two hundred and thirty miles, or thereabouts, the grading of which is about four-fifths completed & the bridges framed, and the ties all made.

That the lands to which said St. Paul Company would become entitled upon the completion of said uncompleted portion of said extensions, and would obtain by such completion, are of great extent & value, to wit, the amount of one million four hundred & seventy-two thousand acres, which, upon the completion of said extensions, will be of the value of six dollars per acre and of the aggregate value of eight million eight hundred and thirty-two thousand dollars.

That the Northern Pacific Railroad Company holds & owns nearly all the shares of the capital stock of said St. Paul Company and said First Division Company, & by virtue thereof has constituted the boards of directors of said Saint Paul Company and First Division Company mainly out of the directors of said Northern Pacific Company; that said Morehead is in the service of
181 said Northern Pacific Railroad Company, and has been for a long time past; that all the management & control of the finances, lands, and property of said Saint Paul Company and said First Division Company for a long time past have been and now are under the control of said Northern Pacific Railroad Company, through its officers and agents.

That the said First Division Company, its officers & stockholders, have wholly failed to carry on the construction of said extensions, and are now wholly unable to do so; & while so neglecting to provide for the construction of said extensions or to apply the proceeds of said extension bonds to that purpose, and while by such neglect the operations of the contractors were so suspended, also neglected to fulfill its duties by securing the lands to which the said Saint Paul Company had become entitled by the completion of a portion of the said line as aforesaid, and does still so neglect & refuse. That by the construction of said completed portion of said extension the said Saint Paul Company became and now is
182 entitled to receive and to have the title to a large amount of lands, to wit, to the amount of between five hundred thousand and six hundred thousand acres, which lies contiguous to such completed portions, and which, with said extensions completed, would be worth at least six dollars per acre, but that the said St. Paul

Company and the said First Division Company and the trustees in said extension mortgage have each utterly neglected to secure said lands, or any of them, by selecting and entering such lands at the land office and procuring the lists thereof, so that the title to such lands has never become absolutely vested in said Saint Paul Company.

That such neglect has been in the interest of and instigated and procured by the said Northwestern Pacific Railroad company, and in fraud of the rights of the bondholders under said extension mortgage. That said Northern Pacific Railroad Company applied for patents for parts of said lands and actually obtained the issue of such patents, dated January 14, 1873, for 29,782½ acres of valuable lands which of right belonged to said St. Paul Company, and con-
183 stituted a part of the premises mortgaged by said extension mortgage; said patents were so obtained on or about January 14, 1873, and said Northern Pacific Railroad Company also claimed divers others of the lands to which the said St. Paul Company and St. Vincent Extension Mortgage were entitled; that the said First Division & St. Paul Companies and the trustees in said extension mortgage having neglected their duty in the premises the bondholders under said extension mortgage applied to the Secretary of the Interior, and on the hearing of said application, and of opposition thereto by said Northern Pacific Railroad Company, the Secretary decided that the claims of the Northern Pacific Railroad Company were invalid, and that the patents were erroneously issued and the right to the lands was in the St. Paul Company. That the said Saint Paul Company, and the First Division Company, and the trustees in said extension mortgage, each and all neglected to oppose said attempt of said Northern Pacific Railroad Company to obtain said lands, and each and all have ever since neglected, and
184 do now neglect, to secure to said Saint Paul Company the title to the lands to which said company is entitled under said decision of the Secretary of the Interior.

That by the terms of the land grants to said Northern Pacific Railroad Company and to said St. Paul and Pacific Railroad Company, if the said Northern Pacific Railroad Company could prevent the further construction of the line of the said St. Paul and Pacific Railroad Company south of Glyndon until the 3rd day of December next, then a part of the lands, being more than 128,000 acres and of a value greater than $768,000.00, which by the said decision of the Secretary of the Interior belongs to the said Saint Paul & Pacific Railroad Company, and are included in the said extension mortgage, would be forfeited, and the right of the same would pass to the said Northern Pacific Railroad Company; and that should such action of said Northern Pacific Railroad Company be successful it would entirely deprive the said St. Paul and Pacific Railroad Company of the benefit of said decision to the extent of one-half of the lands thereby affected, and possibly also of the indemnity lands given to said St. Paul and Pacific Railroad Company by said
185 act of Congress for lands actually settled on other parts of its line.

That the said Northern Pacific Railroad Company has given notice of its intention to take proceedings to resist or reverse the said determination of the Secretary of the Interior, and said last named company has attempted, and still threatens to attempt, to defeat the land grant of the Saint Paul and Pacific Railroad Company, in whole or in part, in order thereby to make the lands which were appropriated by the acts of Congress to the St. Paul and Pacific Railroad Company free and available to the Northern Pacific Railroad Company under its own land grant; and said Northern Pacific Railroad Company has co-operated in procuring the neglects & delays which have intervened in the work of construction and other measures necessary to secure to the Saint Paul Company its proper lands under its land grant, with a like intent and design, and now seeks and designs to defeat the completion of said Saint Paul and
186 First Division lines of railroad within the time limited by law therefor.

That said Moorehead, as agent of said First Division Company, received large amounts of money, proceeds of said bonds, to be applied to the construction of the said extensions, of which moneys he appropriated large sums to other uses, and did not apply to such construction, and he in divers ways and manners has been unfaithful and negligent in respect of his duties as agent.

That of the bonds issued under said extension mortgage the said First Division Company, with the consent and connivance of said Morehead and said George L. Becker, wrongfully and unlawfully and in fraud of the rights of the bondholders under said mortgage, appropriated and expended the proceeds of one million five hundred thousand dollars thereof in constructing and completing the main line of said First Division Company, to wit, its line of road from St. Anthony to Breckenridge; and by such appropriation and expenditure of said money the said First Division Co. was enabled to construct and complete its said main line and to secure the lands appertaining thereto, and without such money said company could not and would not have constructed and completed said main line
187 nor secured said lands.

That the accounts of said First Division Company, and its statements or balance sheets from time to time made and issued, have been obscure, unintelligible, and unsatisfactory, and the business of said company in that respect has been negligently conducted, and by said statements and balance sheets the company appears to have incurred a large floating debt, the origin of which is not accounted for.

That the city of St. Cloud, desiring the First Division Company to make a change in the line of its railroad and the location of its bridge in said city, as an inducement thereto gave that company $65,000.00 in bonds of said city, on which half-yearly interest was payable at seven per cent. per annum; that in consideration thereof said change was made, and said company incurred additional expense of construction by means thereof; but said bonds were wrongfully disposed of, and neither the interest accrued thereon for one and a half years last past nor the proceeds of said bonds have been appropriated to

the payment of said additional expense, or in any way applied
188 to the use of the First Division Company.

That the management of the business and finances of the said St. Paul Company and said First Division Company has been and is negligent, wasteful, and the same will be ruinous to the interests of said companies and of the bondholders under any mortgages thereon unless this court shall interpose and prevent such mischief.

That the business of the main line has been and is grossly neglected and mismanaged to the prejudice of the bondholders; that among other things the First Division Company made contracts with Hill, Grigg & Co., and Armstrong and Co., giving them the exclusive right to carry lumber and wood over the main line; and by means thereof the value of timber lands along that line, and the price of lumber and wood in St. Paul, and consequently the business of various kinds dependent on the preparing and using timber and wood are placed under the control of those parties and subjected to their overcharges and exactions, and the traffic of the railroad is greatly impaired; that on said line and about fifty miles from St.
Paul there is a heavily timbered tract, extending about forty
189 miles along said line and of about 30 miles wide on each side, capable of furnishing railroad ties which are greatly in demand, and the timber is wanted in the market for many purposes; that of said tract the said First Division Company owns 400 sections; that by reason or by color of said contract and the complicity of some of the officials or agents of said First Division Company in the same, said company has failed for the last three years to obtain the benefit of its said timber property, and is still suffering great loss by means thereof, and such losses are remediless; that said contracts are for an unauthorized and unlawful monopoly, and were made in breach of the law and of public rights, and they are producing great harm to the business and trade of citizens as well as to the traffic of the railroad and the lumber interests of the said company, and are exposing said company to the danger of being proceeded against by the State government for breach of charter and public obligations, which already has been threatened by a motion in the Legislature of Minnesota.

That the management of said main line for a long time
190 past has been and now is such as to favor certain parties having grain-houses along the line and to the prejudice of the farmers and producers settled along the vicinity of the line; that the company often fails to have cars in readiness for grain when brought to the railroad, and thereby exposes farmers to the necessity of a forced sale below the price to such parties having grain-houses.

That there is no better time left for the completion of said extensions, and thereby securing the land grant; that it is impracticable to provide means therefor by any legal proceedings to collect moneys from any corporation or persons, or to recover damages from persons and parties delinquent or liable, and unless this court shall interpose by its equity powers and take charge of the trust funds and cause measures to be promptly taken for preserving said

trust funds and securing said land grant, the holders of said bonds will suffer great, inevitable, and remediless loss to the amount of millions of dollars, which such interposition might prevent.

That the said bondholders for the most part reside in Eu-
191 rope, and have taken the bonds and advanced their money thereon mainly upon the security furnished by the land grant, and they look now to said land grant and the road when completed as their principal security.

That twenty per cent. of the proceeds of the said $10,700,000 of bonds were retained and preserved as a special fund to pay the first maturing coupons on the extension mortgage, out of which special fund said coupons hitherto matured have been paid, & a sum remains sufficient for the payment of one or more sets of the coupons not yet matured; that the said First Division Company and said St. Paul Company are now greatly embarrassed and without credit and wholly insolvent, unable to provide the money necessary to the said completion of the road; and that a large amount of interest became payable on the said bonds issued under the said main line mortgage and the said branch mortgage on the first day of May and the first day of June, 1873, which is unpaid, and the First Division Company is in default thereon, and has no means
192 of paying the same.

That the shares of said First Division Company and of the St. Paul Company, to the full amount of the capital thereof, were falsely and fraudulently issued as full-paid stock without any payment therefor to the company, and were so issued to some person or persons unknown to the plaintiffs, by which person or persons the same were transferred to said Northern Pacific Railroad Company, which received and held the same with notice of said fraudulent issue, and paid such person or persons therefor a sum far less than the nominal amount thereof.

That said Saint Paul Company and said First Division Company are wholly without the means or credit to procure the completion of their lines of railroad, and the whole property of said companies will not suffice to pay their debts, and the shares of the capital stock of said two companies are therefore of no actual value as property, and the whole of the estates and franchises of said two com-
193 panies constitute in effect a trust fund for the benefit of the bondholders alone, and in equity ought to be managed and administered for the exclusive benefit and protection of the bondholders.

That if the court shall so interpose and constitute a receiver with adequate power, and place him in possession with the trust funds and mortgaged premises, and give him the necessary power to procure advances of money to complete the extensions upon the receipts or vouchers, which will give a preference to the persons making such advances, the plaintiffs and other bondholders and other men will provide the funds for that purpose; that the amount of money required for said completion is about five millions of dollars, and is so large that it is impossible to provide it by any other means than such receipts and vouchers; that in order so to raise such moneys

it will be necessary for the receiver to be instructed or authorized to give an equal lien and preference to all the lenders, and to
194 pay them interest at such rate as may be necessary to procure the loan, and to agree upon the time of repayment, and to assure the lenders of the first claim on all the property and its proceeds after necessary expenses are discharged.

That the said trustees in the said extension mortgage have at all times utterly neglected to attend to or protect the interest of the bondholders under said mortgage.

That during all the time since the execution of said extension mortgage the said Morehead has been in the employment and service of said Northern Pacific Railroad Company, and during such time has acted under its control and in its interest, and has utterly disregarded the interests of the said First Division Company and the interests of the bondholders under said mortgage.

That during such time the said Becker has been, and now is, president of said First Division Company, and has at all times known of the acts and doings of said company and of said Northern Pacific Railroad Company and of said Moorehead in the premises, and has participated in and consented to all such acts and
195 doings.

That said Horace Thompson is now absent from the State of Minnesota, and cannot be consulted with regard to the institution of this suit.

Wherefore your orators humbly pray that, by the decree of the court herein, the said St. Paul and Pacific Railroad Company and the said First Division of the St. Paul and Pacific Railroad Company and the said George L. Becker may each be required to account in this court of and concerning the said bonds issued under said extension mortgage, and of and concerning the proceeds of the sales of them, or — of them, and of and concerning any advances of money made by any person or persons to said defendants, or either of them, upon any pledge or hypothecation of said bonds, or any of them, and of and concerning any material purchased with the proceeds of said bonds, or with any advances on account thereof, for the construction of said extensions, or either of them, and that the court, through its receiver or other proper officer by it ap-
196 pointed or designated for that purpose, take charge of all the trust funds and property in this bill of complaint mentioned, and secure and preserve the same for the benefit and advantage of the bondholders interested therein; and that the court, by or through such receiver or officer, do or cause to be done all such acts and things as may be necessary to be done to secure the title in the said Saint Paul and Pacific Railroad Company, so that the same may enure to the security and benefit of the bondholders under said extension mortgage to the lands granted to said company by the acts of Congress and mentioned in said extension mortgage; and that all of such trust funds and property may be, or so much thereof as shall be necessary for that purpose, disposed of or sold to pay the cost of completing the construction of said extension; and that after said extensions shall be completed and the title to said bonds secured, the

said extension mortgage may be foreclosed and the said lands may, with all the other property mentioned & described in said extension mortgage, be sold, and the proceeds thereof applied to satisfy the outstanding bonds issued under said extension mortgage; and that pending this suit the court forthwith appoint a receiver of
197 all the property, real and personal, lands, land grants, and franchises of said Saint Paul & Pacific R. R. Co. covered by said extension mortgage, and also of all the property, real & personal, lands, land grants, & franchises of said First Division of the Saint Paul and Pacific Railroad Company, and that said receiver be forthwith admitted into full possession thereof, and that full power and authority be given to him to hold, use, manage, control, and operate the same, and that he may be authorized and instructed to procure advances of money for the speedy and seasonable completion of said extensions, and to secure the repayment thereof, with interest, by preference on the property and franchises of the mortgaged premises and trust funds and on all the property, real and personal, and franchises of said companies, and also to manage such construction and completion of said extensions so as to complete the same by the 1st of December next, with the usual powers of receivers in like cases; and that the court may, by such other and further orders and directions as it may deem fit and agreeable to equity, preserve the trust funds and mortgaged premises and the rights of the bondholders as beneficiaries from loss or prejudice; and that the defendants may be enjoined and restrained from doing or suffering
198 any act or thing in respect of said mortgaged premises, or in prejudice of the plaintiff's rights and demand pending this action, and that your orators may have such other or further relief in the premises as may be meet and just.

And that each of said defendants, or such of them as may be served with process or appear herein, may be required without oath, such oath being hereby expressly waived, to answer all and singular the matters hereinbefore stated. .

May it please your honors to grant unto your orators the most gracious writ of subpœna of the United States of America, to be directed to The Northern Pacific Railroad Company, The Saint Paul and Pacific Railroad Company, The First Division of the Saint Paul and Pacific Railroad Company, Edmund Rice, Horace Thompson, and George L. Becker, defendants, and each of them, thereby commanding them, and each of them, at a certain day and under a certain penalty therein to be specified, personally to be and appear before your honors in this honorable court, and then & there to answer all and singular the premises, and to stand to, perform, and
199 abide such order and decree therein as to your honors shall seem meet; and that the like process may issue to the said defendants, Russell Sage, Walter L. Cutting, Samuel J. Tilden, George T. M. Davis, John P. Yelverton, and William G. Moorehead, whenever and as often as they, or either of them, shall come or be found within this district, in like manner commanding them, or either of them, so coming or found within this district, at a day and under a penalty to be therein specified, to be and appear before your honors

in this honorable court, then and there to answer all and singular the premises, and to stand to, perform, and abide by such order and decree therein as to your honors shall seem meet; and your orators shall ever pray.

GEO. L. OTIS,
GILMAN, CLOUGH & WILDE,
GILFILLAN & WILLIAMS,
*Plaintiff's Solicitors.*

J. M. GILMAN,
*Of Counsel.*

DISTRICT OF MINNESOTA, *ss:*

John S. Barnes, of the city of New York, being duly sworn,
200 deposes & says: That he is one of the complainants in the foregoing bill of complaint; that he has heard read the foregoing bill of complaint & knows the contents thereof, & that the same is true of his own knowledge, except as to those matters which are therein stated to be on his information and belief, and as to those matters he believes them to be true.

JOHN S. BARNES.

Sworn and subscribed to before me, the 9th day of July, A. D. 1873.

H. E. MANN,
*Clerk of said Court.*

201 "EXHIBIT C."

*Extension Mortgage.*

This indenture, made the first day of April, in the year of our Lord one thousand eight hundred seventy-one, between the St. Paul and Pacific Railroad Company, a corporation of the State of Minnesota, of the first part, and Horace Thompson and George S. Becker, of Saint Paul, in the said State, and William G. Moorhead, of Philadelphia, in the State of Pennsylvania, of the second part.

Whereas the said Saint Paul and Pacific Railroad Company is a corporation of the State of Minnesota, duly created and organized under the laws thereof, and particularly under a certain act of the Legislature of said State entitled "An act to facilitate the construction of the Minnesota and Pacific railroad, and to amend and continue the act of incorporation relating thereto," approved March 10th, 1862, and acts amendatory thereof or relating to the railroad therein described, approved, respectively, February 6th, 1864, March 4th, 1864, & March 2d, 1865;

And whereas the said company is duly authorized and empowered by law to construct, maintain, and operate the railroads in
202 the said State of Minnesota hereinafter mentioned and described as the branch lines of the Saint Paul and Pacific Railroad, to be constructed from St. Cloud to Saint Vincent and from Watab to Brainerd, in the said State, and for the construction, maintenance, and equipment thereof; to borrow money and enter

into any and all agreements, and assume any and all liabilities which it may deem proper, and particularly to execute, acknowledge, and deliver a deed of trust or mortgage upon the said branch lines of railroad and the land grants connected therewith, in the manner and form of this indenture;

And whereas the Congress of the United States heretofore, to wit, by a certain act thereof entitled "An act act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said territory, and granting public lands, in alternate sections, to the State of Alabama to aid in the construction of certain railroads in said State," approved March 3d, 1857, and by a certain other act thereof entitled "An act
203 extending the time for the completion of certain land-grant railroads in the States of Minnesota and Iowa, and for other purposes," approved March 3d, 1865, granted to the said State of Minnesota certain lands for the purpose of aiding in the construction of railroads from Saint Cloud aforesaid, by way Crow Wing, to St. Vincent aforesaid, and also from Saint Cloud to the waters of Lake Superior;

And whereas the said State of Minnesota, by the legislative acts thereof aforesaid, granted the said lands applicable to the construction of said railroads from Saint Cloud to Saint Vincent, and from Saint Cloud to the waters of Lake Superior to the Saint Paul and Pacific Railroad Company, as by reference to said legislative acts will more fully and at large appear;

And whereas the Congress of the United States aforesaid, by another act thereof, to wit, an act entitled "An act authorizing the St. Paul and Pacific Railroad Company to change its lines in consideration of a relinquishment of lands," approved March 3d, 1871, enacted and declared: "That the St. Paul and Pacific Railroad Company may so alter its branch lines that, instead of constructing roads from Crow Wing to St. Vincent and from Saint Cloud to the waters
204 of Lake Superior, it may locate and construct in lieu thereof a line from Crow Wing to Brainerd, to intersect with the Northern Pacific railroad, and from St. Cloud to a point of intersection with the line of the original grant at or near Ottar's Tail or Rush Lake, so as to form a more direct route to Saint Vincent, with the same proportional grant of land, to be taken in the same manner, along the said altered line, as is provided for the present lines by existing law: Provided, however, That this change shall in no manner enlarge said grant, and that this act shall only take effect upon the condition of being in accord with the Legislature of the State of Minnesota, and upon the further condition that proper releases shall be made to the United States by said company of all lands along said abandoned lines from Crow Wing to Saint Vincent and from Saint Cloud to Lake Superior, and that upon the execution of said releases such lands so released shall be considered as immediately restored to market without further legislation;"

And whereas the act of said Congress last aforesaid was in conformity with the legislation of the State of Minnesota, and
205 particularly with the act thereof aforesaid approved February 6th, 1864;

And whereas the company has duly accepted the act of Congress last aforesaid, and duly resolved to alter and relocate its branch lines of railroad, as therein provided, and to execute and deliver the releases of the lands along said abandoned route therein mentioned;

And whereas the said party of the first part has entered into a certain contract, bearing even date herewith, for the construction and equipment of said railroads from Saint Cloud to Saint Vincent and Watab to Brainerd with a certain other company of the State of Minnesota known as the First Division of the Saint Paul and Pacific Railroad Company, being a corporation created and organized under an act of the Legislature of the said State entitled "An act to amend the charter of the Saint Paul and Pacific Railroad Company," approved February 6th, 1864, and in and by such contract the last-mentioned company has agreed to loan and advance to the said party of the first part, or for its use and benefit in the construction and
206 equipment of said railroad, the sum of fifteen millions of dollars in bonds of the said company, payable and secured to be paid as hereinafter described, and the said party of the first part has agreed to assume and secure the payment of the said bonds according to the terms thereof;

And whereas, pursuant to such construction contract, and in due conformity therewith, the said First Division of the Saint Paul and Pacific Railroad Company has duly resolved to execute and issue its certain bonds or obligations of one thousand dollars each, payable to the said parties of the second part thereto as trustees, or to bearer, on the first day of January, in the year of our Lord one thousand nine hundred and one, and bearing interest at the rate of seven per centum per annum, payable semi-annually, on the first days of January and July in each year, in the lawful money of the United States, if demanded in New York, or in British pounds sterling, at the rate of four shillings, British money, per dollar, if demanded in
207 London, at the option of the holder.

And whereas the said bonds, or as many thereof as may be necessary, are to be issued and negotiated for the purpose of procuring means to construct and equip the said lines of railroad, and are to be equally and rateably secured hereby, without discrimination or preference between them, on account of the times of actual issue or negotiation; and whereas the said bonds are all of like tenor and date, and in the form following:

UNITED STATES OF AMERICA, $1,000.

(Vignette.) *State of Minnesota:*

(Vignette.)

*First Mortgage Bond.*

Upon 348 miles of railroad and 2,217,200 acres of land.

No. ———.

Issued by the First Division of the St. Paul and Pacific Railroad Company to construct roads from St. Cloud to St. Vincent, and from Watab to Brainerd.

208 Know all men by these presents that the first division of

the St. Paul and Pacific Railroad Company is indebted to Horace Thompson and George L. Becker, of St. Paul, and William G. Morehead, of Philadelphia, trustees, or bearer, in the sum of one thousand dollars, lawful money of the United States of America, which said sum the said company hereby promises to pay the said trustees, or to the bearer hereof, on the first day of January, in the year one thousand nine hundred and one, in the lawful money aforesaid, at its office or agency in the city of New York, or in British pounds sterling, at the rate of four shillings per dollar, at the agency of the said company in the city of London, England, at the option of the holder, with interest on the said principal sum at the rate of seven per cent. per annum, payable semi-annually, on the first days of January and July in each year, in the lawful money aforesaid, on presentation and surrender of the coupons hereto annexed, as they severally become due, at the said office or agency in New York, or payable in British pounds sterling, at the rate of four shillings for each dollar, on presenta-
209 tion and surrender of such coupons, respectively, at the banking house of Robert Benson & Co., in London, England, at the option of the holder, which payment of interest shall in all cases be made without deduction or abatement of any income or other tax imposed or to be imposed *or to be imposed* by the Government of the United States, or any law thereof, and which the said company lawfully might deduct from such interest, to pay over to any officer of such Government, it being understood that such taxes are to be paid by the said company in addition to such interest; and it is hereby expressly declared and agreed that in case default shall be made in the payment, as aforesaid, of any semi-annual installment of interest on this bond, and such installment of interest shall remain unpaid and in arrear for the period of six months after the same shall have become due and been demanded, the principal of this bond, as well as of all the bonds of the series of which this is one, shall become and be due and payable immediately, but subject, nevertheless, to the provisions in that behalf of the deed of trust or mortgage hereinafter mentioned.

210 This bond is one of a series of fifteen thousand bonds of like tenor and date, numbered consecutively from 1 to 15,000, inclusively, and amounting in the aggregate to fifteen millions of dollars, and the payment of the principal and interest whereof is secured by a certain deed of trust or mortgage bearing even date herewith, duly executed and delivered by the Saint Paul and Pacific Railroad Company (being the corporation owning the railroad for the construction of which these bonds are issued) to the said Horace Thompson, George L. Becker, and William G. Moorhead, trustees, and which conveys to the said trustees certain railroads which the said Saint Paul and Pacific Railroad Company is authorized to construct and operate in the State of Minnesota, to wit, a railroad from at or near Saint Cloud to Saint Vincent, being a distance of two hundred & ninety-three (293) miles, more or less, and a railroad from Watab to Brainerd, being a distance of fifty-five (55) miles, more or less, together with the equipments and appurte-

nances of the said railroads, respectively, and the rights, privileges, and franchises thereunto respectively appertaining,
211 and which conveys also to the said trustees all the right, title, and interest which the company last aforesaid now has, or shall or may hereafter acquire, by the construction of said railroads, or any part thereof, or otherwise, in, to, or concerning certain lands situate in the said State which were heretofore granted by the Congress of the United States to aid in the construction of such railroads by acts of the said Congress, approved, respectively, March 3d, 1857, March 3rd, 1865, and March 3rd, 1871, the extent and aggregate area of such lands to which said company will become entitled by the construction of said railroads, under existing legislation, being estimated at two millions two hundred and seventeen thousand and two hundred (2,217,000) acres, more or less.

This bond shall pass by delivery unless registered in the name of the owner on the books of the company in New York or London; but after a registration of ownership certified hereon by the transfer agent or officer of the company, no transfer thereof, except upon the books of the company, shall be valid, unless the last pre-
212 ceding transfer shall have been to bearer; but this bond shall continue, subject to successive registration of ownership and transfers to bearer at the option of each holder.

This bond is made, by the terms of the deed of trust or mortgage aforesaid, receivable at par in payment for any and all lands embraced in said deed which may be sold by the said Saint Paul and Pacific Railroad Company, in conformity therewith. This bond shall not become valid or obligatory until authenticated by a certificate endorsed herein and duly signed by the trustees under said deed.

In witness whereof, the said company has caused its corporate seal to be hereunto affixed, and the same to be attested by the signatures of its president and secretary, and has likewise caused the coupons hereto annexed to be signed by its secretary, this first day of April, one thousand eight hundred and seventy-one.

——— ———, *President.*

——— ———, *Secretary.*

213 Now, therefore, this indenture witnesseth that the Saint Paul and Pacific Railroad Company aforesaid, being the party of the first part hereto, in consideration of the premises and of the sum of one dollar to the said company duly paid at or before the ensealing and delivery of these presents by the said parties of the second part, the receipt whereof is hereby acknowledged, has promised and agreed, and by these presents does promise and agree, to and with the said parties of the second part, for the benefit of any and all persons who shall or may become holders for value of the bonds aforesaid, or any of them, or of any coupons thereunto annexed, that the said St. Paul & Pacific Railroad Company, its successors or assigns, shall and will well and truly pay the said bonds, and each of them, and all interest to accrue upon the said bonds, or any of them, when the same shall become due, or cause the same to

be paid, unto the parties entitled thereto according to the tenor of said bonds, respectively, and of the respective coupons thereunto annexed; but nothing herein contained shall impair or in any manner whatsoever affect the liability of the First Division
214 of the Saint Paul and Pacific Railroad Company upon the said bonds and coupons to the holders thereof.

And this indenture further witnesseth that for and in consideration of the premises, and of the sum of one dollar to it duly paid as aforesaid, the said party of the first part to these presents, in order the better to secure the payment of the principal of the said bonds and all interest thereon as the same shall become payable, according to the tenor of said bonds and the terms of the coupons thereto respectively annexed, has granted, bargained, and sold, and by these presents does grant, bargain, sell, convey, and transfer, unto the said parties of the second part, as joint tenants, and not as tenants in common, and to the survivors and survivor of the said parties of the second part, and the heirs and assigns of such survivor, all and singular that certain branch line of railroad of the said party of the first part or which the said party of the first part is by law authorized to construct, and which is to be constructed, and to run from some point at or near the town of Saint Cloud, in the county of Stearnes, to
215 the town of Saint Vincent, in the county of Pembina and State of Minnesota, being a distance of two hundred and ninety-three (293) miles, more or less, and also all and singular that certain other line of railroad of the said party of the first part, or which the said party of the first part is authorized by law to construct, and which is to be constructed, and to run from Watab, in the county of Benton, by way of Crow Wing to Brainerd, in the county of Crow Wing, to intersect with the Northern Pacific railroad, being a distance of fifty-five (55) miles, more or less, as contemplated by the said act of Congress, approved March third, 1871, together with the equipments and appurtenances of the said railroads, respectively, and the rights, privileges, and franchises thereunto respectively belonging or in anywise appertaining, or which shall or may at any time hereafter thereunto belong or in anywise appertain.

And also all right, title, and interest which said party of the first part now has, and all right, title, & interest which the said party of the —— part, its successors or assigns, shall or may at any time hereafter acquire by reason of the construction of said railroads, or of either or of any part of either thereof, or otherwise, in, to, or concerning the lands situate, lying, and being in the State of
216 Minnesota, which are embraced or intended to be embraced in the grants aforesaid, or either of them, made by the Congress of the United States to the former Territory and present State of Minnesota by the acts of said Congress hereinbefore mentioned, or either of them, and which have been granted by said State to the party of the first part, or shall or may be granted or conveyed to the said party of the first part, its successors or assigns, to aid in the construction of the said lines of railroad, or of either or of any part of either thereof, including in the premises hereby conveyed, and it being the true intent of these presents to convey the road-beds of

the said railroads, respectively, and all tracks, bridges, viaducts, culverts, fences, depots, stations, station-houses, engine-houses, car-houses, freight-houses, wood-houses, machine shops, and other shops, and all other structures, buildings, and materials whatsoever, placed and to be placed on the said railroads, respectively, or on either or any part of either thereof, or acquired or to be acquired for the use of the same, and also all locomotives, tenders, passenger, bag-
217 gage, freight, cattle, and other cars, and all other rolling-stock whatsoever, and all machinery, tools, implements, fuel, and materials for constructing, operating, repairing, or replacing the said railroads, or either or any part of either thereof, or any of the equipments or appurtenances of the said railroads, or of either or any part of either thereof, and all property, rights, and privileges whatsoever appertaining to the said railroads or to either or any part of either thereof, now held by the said party of the first part, its successors or assigns, together with all and singular the tenements, hereditaments, and appurtenances to the said railroads, lands, and premises, or any part thereof, belonging or in anywise appertaining; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, in, to, and concerning the same, and each and every part and parcel thereof, with the appurtenances.

To have and to hold the said railroads, lands, and premises unto the said parties of the second part, as joint tenants, and not as tenants in common, and unto the survivors and survivor of
218 the said parties of the second part, and the heirs and assigns of such survivor, forever; but in trust, nevertheless, to and for the uses and purposes and with the powers and authorities hereinafter mentioned and set forth; that is to say:

Article First. Until default shall be made by the said First Division of the St. Paul and Pacific Railroad Company, its successors or assigns, in the payment of either the principal or interest of the said bonds, or some one of them, the said party of the 1st part, its successors and assigns, shall be suffered and permitted to possess, manage, operate, and enjoy the said railroads, respectively, with the equipments and appurtenances thereof and the franchises appertaining thereto, and to receive, take, and apply to its and their own use the tolls, incomes, revenues, rents, issues, and profits thereof in the same manner and with the same effect as if this deed had not been made.

Article Second. In case default shall be made in the payment of any interest to accrue on any of the aforesaid bonds,
219 issued or to be issued by the First Division of the Saint Paul and Pacific Railroad Company, when such interest shall become payable according to the tenor of such bond, or the terms of any coupon thereto annexed, and such default shall continue for the period of three months; or in case default shall be made in the payment of the principal of any of said bonds, or in case default shall be made in the observance or performance of any other matter or thing in these presents mentioned and agreed, or required to be

observed and performed by the party of the first part, its successors or assigns, or by the said First Division of the St. Paul and Pacific Railroad Company, its successors or assigns, and such default shall continue for the period of six months, then and from thenceforth, and in either of such cases, it shall be lawful for the said parties of the second part, being the trustees under these presents, or for the survivor or survivors of said trustees, or their or his successors or successor, personally, or by their or his attorneys or agents, to enter into and upon all and singular the railroads and premises hereby conveyed or intended so to be,
220 or any part thereof, and from thenceforth to have, hold, possess, and use the said railroads and premises, and each and every part and parcel thereof then subject to the lien of these presents, operating and conducting the business of the said railroads, respectively, by their or his superintendents, managers, receivers, and servants, or other attorneys or agents, and making from time to time all repairs and replacements and such useful alterations, additions, and improvements thereto as may seem to them or him to be judicious; and to collect and receive all tolls, fares, freights, incomes, rents, issues, and profits of the same, and of every part thereof; and after deducting the expenses of operating the said railroads, respectively, and conducting the business thereof, and of all the said repairs, replacements, alterations, additions, and improvements, and all payments which may be made, or may be due, for taxes, assessments, charges, or liens prior to the lien of these presents upon the said premises, or any part thereof, as well as just compensation for their or his own services, and for the services of such
221 attorneys and counsel as shall have been by him or them employed to apply the moneys arising as aforesaid to the payment of interest on the said bonds in the order in which such interest shall have become and shall become due, ratably to the persons holding the coupons, evidencing the right to such interest; and if, after paying in full the interest which shall have accrued on the said bonds, a surplus of the moneys arising as aforesaid shall remain, and the principal of said bonds shall not be due, nor such surplus, or any part thereof, required in the judgment of said trustees for the protection of the property, or to provide for the installment of interest next thereafter to fall due, the same shall be paid over to the said party of the first part; but in case the principal of said bonds, or any of them, shall have become due, the surplus arising as aforesaid shall be reserved, to be applied to the payment of said bonds, upon the sale of the said railroad and premises, as provided in the next following article of these presents.

222 Article Third. In case default shall be made in payment of interest on said bonds, or any of them, as aforesaid, and shall continue as aforesaid, or in case default shall be made in the payment of the principal or any part thereof of the said bonds, or any of them, it shall be lawful for the said trustees, or for the survivors or survivor of the said trustees, or for their or his successor or successors in the trust by these presents created, to enter into and upon all and singular the railroads and premises aforesaid, and after

such entry or after other entry, or without entry, personally, or by their or his attorneys or agents, to sell and dispose of the said railroads and of all and singular the property, rights, and franchises hereinbefore conveyed, or intended so to be, and which shall be then subject to the lien of these presents, at public auction, either in the city of New York or the city of St. Paul aforesaid, or at such place along the line of either of said railroads and within the State of Minnesota as the said trustees or the survivors or sur-
223 vivor of them, or their or his successors or successor in said trust shall designate, and at such time as they or he shall appoint, having first given notice of the time and place of such sale by advertisement, published not less than three times a week, for six successive weeks in one or more newspapers in the city of New York, and also published not less than three times a week in each week for six weeks in one or more newspapers in the city of Saint Paul and also in the city of London, and after such notice it shall be lawful for the said trustees or trustee to make such sale or to adjourn the said sale from time to time, in their or his discresion, and if so adjourning, to make the same without further notice at the time and place to which the same may be so adjourned, and to make and deliver to the purchaser or purchasers of the said railroad, lands, and premises, or any part thereof, good or sufficient deed or deeds in the law for the same in fee simple, which sale made as aforesaid shall be a perpetual bar, both in law and equity, against the said party of the first part, it successors and assigns, and all other persons claiming or to claim the said premises, or any part or
224 parcel thereof, by, from, through, or under the said party of the first part, its successors or assigns. And after deducting from the proceeds of such sale just allowances for all expenses thereof, including attorneys' and counsel fees and all other expenses, advances, or liabilities which may have been made or incurred by the said trustees or trustee in operating or maintaining the said railroads and premises or in managing the business thereof, it shall be lawful for the said trustees or trustee, and it shall be their or his duty, to apply the residue of the moneys arising from such sale to the payment of the principal and accrued and unpaid interest on all the said bonds which shall then be outstanding, without discrimination or preference as between principal — accrued and unpaid interest, or as between the holders of said bonds or of any coupons issued therewith, but equally and ratably to all such bond and coupon holders.

And it is hereby declared and agreed that the receipt of the said trustees shall be a sufficient discharge to the purchaser or pur-
225 chasers at such sale for his or their purchase-money, and that after payment of such purchase-money, and having such receipt, the said purchaser or purchasers shall not be obliged to enquire into the application of such purchase-money upon or for the trusts or purposes of these presents, or be in any manner whatsoever answerable for any loss, misapplication, or non-application of such purchase-money, or of any part thereof, or be obliged to en-

quire into the necessity, expediency, or authority of or for any such sale.

Article Fourth. At any public sale of the said railroads and property, or any part thereof, whether made by virtue of the power hereinbefore granted or by judicial authority, the trustees hereunder, for the time then being, may bid for and purchase, or cause to be bid for and purchased, the property so sold, or any part thereof, in behalf of all the holders of bonds secured by this instrument and then outstanding in the proportion of the respective interests of such bondholders at a reasonable price, if but a portion of said property shall be sold; and if the entire railroad and property shall be sold, then at a price not exceeding the whole amount
226 of said bonds then outstanding, with the interest accrued thereon and the expenses of such sale.

Article Fifth. In case default shall be made in the payment of any half-yearly installment of interest on any of the said bonds, when such interest shall become payable according to the tenor of said bond, or of any coupon thereto annexed, and such installment of interest shall remain unpaid and in arrear for a period of six months after the same shall have been demanded and become payable as aforesaid, then and from thenceforth the principal sum of each of the bonds aforesaid shall, at the option of the trustees hereunder, become and be immediately due and payable, notwithstanding that the time limited in the said bonds for the payment thereof may not then have elapsed; but a majority in interest of the holders of all the bonds aforesaid which shall be then outstanding, and upon which default in the payment of interest shall have been
227 made and be continuing and shall have the power, by an instrument in writing under their hands and seals, or by a vote at a meeting duly convened and held as hereinafter provided at any time before the actual payment and acceptance of the interest in arrear, to instruct the trustees to declare the said principal due, or to waive the right so to declare, on such terms and conditions as such majority in interest shall prescribe; and such majority in interest may, by such instrument in writing or such vote, annul or reverse any declaration of the trustees in respect to said bonds becoming or not becoming immediately payable: Provided always, That no act or omission, either of the trustees or the bondholders in the premises, shall extend to or be taken in any manner whatsoever to affect any subsequent default.

Article Sixth. The trustees hereunder shall, at all times during the continuance of the trust hereby created, have full power and authority, to be exercised in their own discretion and not otherwise, to release and convey to any party who may be designated,
228 in writing, by the said party of the first part, its successors or assigns, to receive the same, or to release from the lien and operation of these presents, in such other manner as they may deem proper, any portion of the premises hereinbefore granted which may be appurtenant to either of the said railroads, but which, in the judgment of the said trustees, shall be unnecessary for use in connection therewith, and which shall have been acquired or held for

stations, depots, shops, or other buildings, or for a supply of fuel, gravel, or other material, and also to convey or release as aforesaid, on like request, any lands not occupied by the track which may become disused by reason of a change of the location of any station-house, depot, shop, or other building connected with either of the said railroads, and such lands occupied by the track and adjacent to such station-house, depot, shop, or other building as the said party of the first part, its successors or assigns, may deem it expedient to disuse or abandon by reason of such change, and they may consent to any changes in the location *or* any depot or other building which in their judgment shall have become expedient, and make and devise
229 the instruments necessary or proper to carry the same into effect: Provided always, That any and all lands and premises which shall be acquired for permanent use in substitution for any so released shall be conveyed to the trustees upon the trusts of these presents, and that the proceeds of any and all lands and premises for which others shall not within a reasonable time be required shall be paid over to the said trustees, to be by them invested in the purchase of the bonds aforesaid, in the manner hereinafter provided, which bonds shall, when so purchased, be cancelled and surrendered to the party of the first part, its successors or assigns, from time to time, to dispose, according to its or their discretion, of such portions of the equipment, machinery, and implements which shall be at any time held or acquired for the use of either of the said railroads, but which shall have become unfit or unnecessary for such use, it being provided, however, that any and all new or other equipment, machinery, and implements which may be acquired in sub-
230 stitution for any so released shall, by virtue and force hereof, become and be, immediately upon the acquisition of the same, subject to the lien and operation of these presents, without any new conveyance or transfer or other act or ceremony whatsoever; and the proceeds of all sales of equipment or other personal property which may not be reinvested in new equipment, machinery, or implements for use upon or [in] connection with said railroad shall be paid over to the said trustees, to be by them applied as hereinafter provided in regard to the proceeds of the sales of lands.

Article Seventh. The said party of the first part, its successors or assigns, shall and will, as soon as conveniently practicable after date hereof, cause all and singular the lands granted as aforesaid to aid in the construction of said railroads to be carefully valued and appraised by one or more competent persons, in convenient sections, divisions, or parcels, for sale to emigrants and actual settlers, and in such appraisement any and all lands containing or supposed to contain coal or iron, or any valuable mineral substance, shall
231 be distinguished from those which are classed as agricultural or pastoral, and shall cause a full and accurate list and description of said lands and premises, containing opposite each appraised section, division, or parcel the value put upon the same, to be deposited with each of the said trustees, certified under the hands and seals of the appraisers, which appraisement shall be subject to the approval of said trustees or a majority of them,

and such statement and appraisal may, with the consent of them, or a majority of them, be from time to time revised, altered, and corrected, a statement being in each case filed as aforesaid; and the said party of the first part, its successors or assigns, may at any time in its or their own discretion, and not otherwise, contract for the sale of any section, division, or parcel of said lands so appraised, at a price not less than the appraised value thereof, according to the last preceding statement of such value, filed with said trustees, and approved by them, or any two — them, as aforesaid, and shall be entitled to have such section, division, or parcel of said lands released from the lien hereof, upon the payment to the said trustees of the purchase-money of the
232 same, not less than such appraised value thereof; and the said trustees, or any two of them, are hereby authorized and empowered, upon the sale as aforesaid of any such section, division, or parcel of said lands, and the payment of the purchase-money thereof as aforesaid, to release and convey to such purchaser or purchasers, or to his or their heirs or assigns, the premises so sold, and thereby to discharge the same from the lien and operation of these presents and the trusts hereby created: Provided always, That no section, division, piece, or parcel of said lands shall at any time be sold or released as aforesaid below the appraised value thereof without the consent in writing of all the trustees first had and received to such sale.

And it is hereby further declared and agreed that any of the lands aforesaid may be sold, as in this article above provided, wholly or partly on credit: Provided, That in any and every case of sale wholly or partly on credit, and to whomsoever the sale may be made, the purchaser shall not receive a conveyance of the premises sold, or any part thereof, until payment
233 in full of the purchase-money, but may have delivered to him a contract in evidence of his purchase, unless for any special reason it shall be expedient, in the judgment of the said trustees, or any two of them, to accept from such purchaser a purchase-money bond and mortgage for the amount remaining unpaid, in which case the said trustees, or any two of them, may release the said premises to such purchaser upon receiving from him the cash portion of such purchase-money and his personal bond for the unpaid purchase-money, conditioned in double the amount of the said unpaid purchase-money for the payment of the same in installments or otherwise within a period of not exceeding five years from the date of such purchase, with interest thereon, payable semi-annually.

And it is hereby expressly declared and agreed that any and all of the bonds aforesaid issued or to be issued by the said First Division of the Saint Paul and Pacific Railroad Company as aforesaid, and the payment whereof is intended to be hereby secured, shall be payable and receivable at the par value thereof, including
234 the interest then accrued thereon on account and in payment of the purchase-money of any section, division, piece, or parcel of said lands which shall be sold as aforesaid, and said

bonds shall, in such payment, be deemed and accepted as equivalent, in all respects, dollar for dollar of the principal and accrued interest thereof, to the same nominal amount.

Article Eighth. It is hereby declared and agreed that, for the purpose of granting and releasing from the lien of these presents such of the lands and premises aforesaid as shall or may be sold in conformity with the last preceding article of these presents, the said trustees, respectively, may act, and they are hereby severally and respectively authorized and empowered to act by agent or attorney; and all instruments executed and acts done by the agent or attorney of any of said trustees duly appointed for that purpose, in respect to the conveyance or release of lands, which shall be sold in conformity with said article, shall be as valid and effectual to
235 all intents and purposes, if the same be within the scope of authority of such agent, as if the same were executed by the trustee appointing such agent in person: Provided, That every such power of attorney may be revoked by the trustee giving the same at his pleasure at any time before the execution of the authority therein granted, and that each of the said trustees may remove at pleasure any agent by him appointed: And provided further, That nothing herein contained shall be construed to prevent the said trustees from uniting on any one or more persons as such agent or agents.

Article Ninth. The trustees, or any two of them, shall be authorized to allow reasonable compensation to any agents appointed by them as aforesaid, and to such clerks and assistants, if any, as they may deem it necessary to employ, or as they may deem it necessary or proper for the said company to employ, in regard to the sale of said lands, as in article seventh provided, and the preparation of contracts and conveyances thereof; and they may from time to time allow to be deducted out of the proceeds of lands so sold an amount sufficient to defray such expenses, if, in their judgment, such expenses be reasonable and proper, and in just proportion to the
236 benefit derived by this trust from sales of the said land: Provided always, That the holders of the bonds hereby secured shall not, nor shall the said trustees, or either of them, become or be in any manner whatever personally liable or responsible for, or in respect to, any such liabilities or expenditures.

Article Tenth. The net proceeds of any and all sales of the lands aforesaid, granted or to be granted, as aforesaid, for the purpose of aiding in the construction of said railroads, or any part thereof, which may be made by the said party of the first part, its successors or assigns, in conformity with the foregoing provisions of this instrument, are hereby invio-bly pledged to the payment of the interest on said bonds and the redemption of the principal thereof, in the manner hereinafter mentioned; and the said trustees shall semi-annually apply the said net proceeds, first, to the payment, at maturity, or as soon thereafter as practicable, of any installment of interest on said bonds for which the said First Division of the Saint Paul and Pacific
237 Railroad Company shall have failed to make due provision; and, secondly, to purchase of said bonds at the lowest price

or prices not exceeding a premium of ten per centum over the par value thereof at which the said bonds may be offered for sale to the said trustees; but preparatory to such purchase of bonds in any semi-annual period in which the said trustees shall have funds in their hands applicable thereto, the said trustees shall, except in cases where, in their judgment, the amount of bonds which such funds would purchase shall make it inexpedient to incur the expense, give public notice, by advertisement in two newspapers of good circulation, in their judgment, published in the city of New York, and one newspaper published in the city of London, at least three times a week for two successive weeks, of their desire to receive proposals for the sale to them of the said bonds, to such amount as the said funds in their hands may suffice to purchase; and after the expiration of two weeks from the last publication of such notice
238 they shall apply the said funds to the purchase of said bonds at the lowest price or prices at which they may be offered, without discrimination or preference between the bondholders offering the same for sale: Provided, however, That if the said bonds shall at the time being be quoted on the stock exchange and have a known market value in New York or London, and such market value shall be lower than any price at which the said bonds may be offered pursuant to the notice aforesaid, the said trustees may purchase the said bonds at the stock exchange in either city instead of from parties sending proposals to sell pursuant to such advertisement.

And it is hereby agreed & declared that all expenses attending such purchases of bonds and the publication and notification thereof may be defrayed by the said trustees from the said sinking fund.

The trustees shall, without unreasonable delay, cancel the bonds so redeemed by them, and surrender the same to the said party of the first part, its successors or assigns; and they and the said
239 party of the first part shall keep separate registries of all bonds so redeemed; and the registry of the company, showing the numbers and amounts of the bonds so redeemed, shall be at all reasonable hours and times open to the inspection of the several holders of the bonds hereby secured, as well as of the said trustees; and the numbers and amounts of all bonds redeemed in each year shall be stated in the annual report to be made by the directors of the said company for such year to the stockholders thereof.

Article Eleventh. The First Division of the Saint Paul and Pacific Railroad Company shall hereafter keep at its transfer office or agency in the city of New York, and also at its London agency, an appropriate book for the transfer of said bonds, and shall also keep at the same places a certain other book to be designed as the register of first mortgage bondholders, and any and every holder of bonds secured hereby shall be entitled to have his name and address, and the denomination and number of any of the said bonds held by him, entered in such register upon presenting at the aforesaid office
240 or agency a written statement of the said particulars signed by himself, and if required, duly verifying his title to said bonds by the production thereof, or upon the written order of the

person last registered as the holder. The registration of the name and address of each bondholder, and the denomination and numbers of the bonds by him held upon such book, either in New York or London, shall be evidence of the right of the person so registered to vote as a bondholder, or to do any other act which by these presents a bondholder is declared or may be entitled to do in respect to the bonds so registered. Each of the trustees shall have free access, at all reasonable hours and times, to such bond registry, and shall from time to time, on request in writing, be furnished with a copy thereof by the said company. Meetings of the said first mortgage bondholders may be called in the manner hereinafter provided, or in such other mode as may be fixed by regulations prescribed or established by the bondholders, and the bondholders may vote at such meetings in person or by proxy, and the quorum may be defined, and such other regulations or by-laws in respect to such meetings may be from time to time established, altered, or repealed
241 by the bondholders, acting by the majority in interest, as to them shall seem expedient; and until the bondholders shall act such powers may be exercised by the trustees.

The said trustees, and each of them, shall have the right to require that any act or resolution of the said bondholders affecting the duties of said trustees shall be authenticated by the signatures of all the persons assenting thereto, as well as by a minute of the meeting.

Article Twelfth. The said party of the first part shall at all times keep at its principal office and at its agencies, in the cities of New York and London, respectively, a record of all the sales of lands which shall be made as aforesaid, and of the prices paid for the same, and the manner in which the purchase-money shall have been paid or secured, and of the amount, denomination, and numbers of the said bonds (if any) surrendered on account thereof, which record shall at all reasonable hours and times be open to the inspection, with the right of copy therefrom, of any and all holders of the bonds hereby secured; and the said trustees, or a majority of them,
242 shall semi-annually, to wit, in the months of January and July in each year, file in said office a statement of the lands which shall have been by them released from the lien of these presents during the six months last preceding the time of filing such statement, and of the consideration received by them therefor, and of the disposition made of the same, which statement of said trustees shall also be at all reasonable hours and times open to the inspection of said bondholders, with the right to copy therefrom as aforesaid.

Article Thirteenth. In case default shall be made in the payment of any semi-annual installment of interest to accrue on any of the said bonds, and if such interest shall remain unpaid and in arrear for the period of six months, or in case default shall be made in the payment of the principal of any of the said bonds, then, in either and every such case, it shall be the duty of the trustees under these presents, upon a requisition to them in writing, signed by the holders of not less than one-third of the whole amount of said bonds then outstanding
243 and upon adequate indemnity against all costs, expenses, and liabilities to be by said trustees incurred, to proceed to enforce

the rights of the bondholders under these presents, either by the exercise of the powers granted by articles second & third of these presents or by a suit or suits in equity or at law, in aid of the execution of such powers, or otherwise as the said trustees, being advised by counsel learned in the law, shall deem most effectual to enforce such rights, it being understood, and hereby expressly declared, that the rights of entry and sale hereinbefore granted are intended as cumulative remedies additional to all other remedies allowed by law, and that the same shall not be deemed in any manner whatsoever to deprive the said trustees or the beneficiaries under this trust of any legal or equitable remedy by judicial proceedings consistent with the provisions of these presents, according to the true intent and meaning thereof.

And it is hereby further declared & agreed that in case any trustee hereunder shall, in violation of the terms of this article, refuse to proceed, or unreasonably delay in proceeding, to enforce the
244 rights of bondholders upon requisition and indemnity as above specified, any or either of the other trustees may proceed to enforce such rights in the manner hereinbefore specified, and to exercise all the powers and authorities in that behalf hereinbefore granted as validly and effectually as if the trustee so refusing or unreasonably delaying had joined in the enforcement and exercise of the same: Provided always, And it is hereby expressly declared and agreed, that no holder of bonds secured to be paid hereby shall have the right to institute any suit or proceeding, in law or in equity, for the foreclosure of this indenture, or the execution of the trusts thereof, without first giving notice in writing to the said trustees of default having occurred and requ-sting them and affording them a reasonable opportunity to institute such suit or proceeding in their own name, or to proceed to exercise the powers hereinbefore granted, and offering to them adequate indemnity against the costs and expenses of such suit or proceeding; and such notification, request, and offer of indemnity is hereby declared to be a condition precedent to any cause of action for the foreclosure hereof or the appointment of a receiver hereunder.

245 Article Fourteenth. It is mutually understood and agreed by and between the parties to these presents, and it is hereby declared, that the word "trustees," as used, and whenever the same may occur in this indenture, is intended to refer to and describe, and the same shall in all cases be construed to mean, the persons, or, in case of vacancies in the trust, the person who for the time being shall be charged with the execution of the trusts of these presents, whether such persons or person be the said parties of the second part, or any or either of them, or successors or a *a* successor of said parties of the second part, or of any or either of them, hereunder; and in case of a vacancy or vacancies in said trust, the surviving or continuing trustees or trustee shall be competent to exercise any and all powers and authorities hereunder hereinbefore granted to the "trustees," or to the said parties of the second part. And it is further mutually agreed and declared that each of the said trustees shall be entitled to reasonable compensation for any and all services

which may hereafter be rendered by him in said trust, which compensation the said party of the first part hereby promises and agrees to pay; but in case the said party should make default in
246 such payment, the same may be retained by the trustees out of any trust moneys coming into their hands, and such reasonable sum as shall be so retained shall, unless the said trustees be then in possession of said premises, become and be a lien upon the said premises, and secured by the trusts of this indenture, to be paid by the said party of the first part, with interest, for the benefit of the sinking fund hereinbefore created.

And it is further mutually agreed that the said trustees shall not, nor shall any of them, be in any manner whatever responsible for the default or misconduct of each other in said trust, or for the default or misconduct of any agent or attorney appointed pursuant to these presents, if such agent or attorney be selected with reasonable care, or for anything whatever in respect to said premises or the trusts hereby created, except personal misconduct or gross negligence in the execution of said trusts.

And it is further mutually agreed that the said trustees, or any or either of them, may resign the trust hereby created and be discharged from all further duty thereunder upon giving three
247 months' notice in writing to the said party of the first part and calling a meeting of the bondholders, or upon such shorter notice as the said party of the first part and a majority in interest of the said bondholders may accept as sufficient; and also that the said trustees, or any or either of them, may be removed from office by a vote of a majority in interest of the holders of the said bonds, the said vote being had at a meeting of the said bondholders duly held, and being attested by an instrument in writing under the hands and seals of the persons so voting; and that in case at any time hereafter either of the said trustees, or any trustee hereafter appointed, shall die or resign or be removed as herein provided or by a court of competent jurisdiction, or shall become incapable or unfit to act in the said trust, a successor to such trustee may be appointed by the holders, for the time being, of a majority in interest of the said bonds then outstanding, at a meeting of said bondholders to be duly convened and held in conformity with the provisions of these presents.

And be it further mutually agreed and declared, that in case any trustee hereunder shall die or resign or be removed
248 as herein provided or otherwise, or become *non compos mentis* or otherwise legally incapable or unfit to act in said trust, all of his powers and authorities shall, if there be any of his associate trustees continuing in office, vest in such associate trustees or trustee, subject to the provisions of these presents, until the appointment of a successor to such trustee; and that upon the appointment of a successor to such trustee, such successor shall by force of these presents and without any further assurance or conveyance become vested with and entitled to exercise any and all powers and authorities such trustee so dying, resigning, being removed, or becoming *non compos mentis* or otherwise legally incapa-

ble or unfit to act in said trust, was vested with or entitled to exercise at the time of his decease, resignation, or removal, or of his becoming *non compos mentis* or legally incapable or unfit to act as such trustee; but, nevertheless, in case of resignation or removal the trustee so resigning or being removed, and in case of the death of a trustee, the surviving trustee shall, if so required
249 by a majority in interest of said bondholders, or by the new trustee who may be appointed, execute, acknowledge, and deliver to him a good and sufficient deed or other instrument to vest in him all the powers and authorities which were possessed by his predecessor in said trust as aforesaid, under or by virtue of these presents: Provided, nevertheless, That in case it shall prove, after reasonable exertions, to be impracticable to appoint a trustee in the manner aforesaid, and that the appointment of such new trustee shall be inconveniently or unreasonably declared, and that such vacancy in said trust shall continue for the period of ninety days after the existence of the same shall have been made known to any meeting of said bondholders, and to the said party of the first part, it shall be competent for any holder or holders of said bonds to the amount of not less than five hundred thousand dollars to apply to any court of competent jurisdiction for the appointment of a new trustee to fill such vacancy, upon such reasonable notice to the parties interested, including the said party of the first part, as the said court may prescribe: and any trustee lawfully appointed upon such application shall become vested with and be subject to the same powers and authorities as if ap-
250 pointed by the said bondholders in the manner aforesaid.

And it is further expressly declared and agreed that whenever and as often as any contingency shall arise in which the action of a majority in interest of the holders of said bonds shall be necessary, or in which the said bondholders are herein declared to have any discretionary voice or power, it shall be the duty of the said trustees, and they or a majority of them shall be, and they are hereby, authorized and required, to call a meeting of all the holders of bonds secured hereby, to be held in the city of New York, by advertisement (the expense whereof shall be a liability of the said party of the first part hereunder, and may be defrayed, if necessary, from the trust funds) to be published three times in each week, for six weeks, in at least two newspapers of good circulation amongst the business community in said city, and one newspaper in the city of London, or the said meeting may be called in such other manner as may be prescribed for the convening of meetings of said bondholders, pursuant to the provisions of this instrument; and in default of such meeting
251 being called by the said trustees, or a majority of them, within thirty days after notification in writing to them by any bondholder of the necessity therefor, it shall be competent for any holder or holders of said bonds to the aggregate amount of five hundred thousand dollars to call said meeting in the manner aforesaid, and at such meeting so convened the holders of said bonds shall be com-

petent to exercise in person, or by proxy, all the powers and authorities conferred upon them by these presents.

Article Fifteenth. The First Division of the Saint Paul and Pacific Railroad Company having contracted, as aforesaid, to construct and equip said railroads, and it being contemplated by the said party of the first part to lease said railroads to the said company for a term of ninety-nine years, it is hereby expressly provided, agreed, and declared that any and every such lease shall be in all respects subject to these presents and to the due enforcement and execution thereof, and to all and singular the powers, rights, and trusts herein contained; and it is hereby further provided, agreed, and de-
252 clared that any and all rolling-stock, equipment, and materials whatsoever which, pursuant to such lease or otherwise, shall or may be acquired or furnished for the use of the said railroads, or either of them, by the said First Division of the Saint Paul and Pacific Railroad Company shall, by the mere acquisition thereof for such use, become and be part and parcel of the property hereinbefore granted, and become and be subject, in all respects, to the lien and operation thereof, in the same manner and with the same effect as if such property had been acquired by the said party of the first part hereto for such use.

Article Sixteenth. If the said First Division of the Saint Paul and Pacific Railroad Company, or the said party of the first part, or the successors or assigns of either of said companies, shall well and truly pay the principal of each and every of said bonds when the same shall become payable, and all interests thereon as such interest shall from time to time mature, according to the tenor of such bonds, respectively, and the terms of the several coupons thereto annexed,
253 and shall well and truly do and observe every other matter and thing provided or mentioned in these presents to be by them respectively done and observed, then and in that case all the estate, right, title, and interest of the said parties of the second part, and of the survivors or survivor of them, and of their and his successors and successor in the trust by these presents created, shall cease, determine, and become void; otherwise the same shall remain in full force and virtue.

And the said party of the first part, for itself, its successors and assigns, in consideration of the premises, and of one dollar to it duly paid by the said parties of the second part, the receipt whereof is hereby acknowledged, hereby covenants and agrees to and with the said parties of the second part, and their successors in the trust created by these presents, that whenever and as often as the said party of the first part, its successors or assigns, shall hereafter acquire any lands from the Government of the United States, or from the State of Minnesota, by reason of the construction of the railroads hereinbefore granted, or either or any part of either thereof, or shall acquire any other property, rights, franchises, or things whatsoever per-
254 taining to or for use upon the railroads hereinbefore granted, either or any part of either thereof, the said party of the first part, its successors and assigns, shall and will acquire, possess, and hold the same, and every part and parcel thereof, upon and subject

to the trusts of this indenture, until conveyance thereof in pursuance of the covenant next hereinafter contained shall be duly made and delivered to the said parties of the second part, or their successors in the trust by these presents created.

And the said party of the first part, for itself, its successors and assigns, hereby covenants and agrees to and with the said parties of the second part, and their successors in the trust created by these presents, that the said party of the first part, its successors and assigns, or the said First Division of the Saint Paul and Pacific Railroad Company, its successors or assigns, shall and will diligently and faithfully use and apply the net proceeds of the negotiation of said bonds, or such of them as shall be negotiated, to the construction and equipment of said railroads, and shall and will, in each and every year ensuing the date hereof, also faithfully use and apply the net earnings and income to be from time
255 to time derived from said railroads, or either of them, to the payment of the interest accruing in such year on said bonds when the same shall become due, until all the said bonds shall be fully paid and satisfied; and that the said party of the first part and the said First Division of the Saint Paul and Pacific Railroad Company, and their respective successors and assigns, shall and will from time to time and at all times hereafter, and as often as thereunto requested by the trustees under this indenture, execute, deliver, and acknowledge all such further deeds, conveyances, and assurances in the law, for the better assuring unto such trustees, upon the trusts herein expressed, the railroads aforesaid, together with their equipments, appurtenances, and franchises and all and singular the lands, property, and things hereinbefore mentioned or described and granted or conveyed or agreed to be granted or conveyed to the said parties of the second part, or their successors in the trust created by these presents, as by the said parties of the second part or their successors in the trust hereby created or by their counsel learned in the law shall be reasonably advised, devised, or required.

256 In witness whereof, the said party of the first part has caused its corporate seal to be hereunto affixed, and the same to be attested by the signatures of its president and secretary, and the said parties of the second part, for the purpose of evidencing their acceptance of this trust, have hereunto set their hands and seals, the day and year first above written.

257 "EXHIBIT A."

*Construction Contract.*

Articles of agreement made the first day of April, in the year of our Lord one thousand eight hundred and seventy-one, by and between the First Division of the Saint Paul and Pacific Railroad Company, a corporation of the State of Minnesota, of the first part, and the Saint Paul and Pacific Railroad Company, a corporation of the same State, of the second part, witnesseth: That the said parties

of the first and second parts have promised and agreed, and by these presents do covenant, promise, and agree, to and with each other, as follows, to wit:

I. The said party of the first part has agreed, and does hereby agree, to assume and undertake to construct the lines of railroad which the said party of the second part is by law authorized to construct and maintain and operate in the said State of Minnesota, from some point at or near Saint Cloud, in the county of Stearnes, to Saint Vincent, in [the] county of Pembina, being a distance
258 of two hundred and ninety-three (293) miles, more or less, and from Watab, in the county of Benton, to Brainerd, in the county of Crow Wing, being a distance of fifty-five miles, more or less, and to complete, equip, & put the same and every part thereof in good running order and condition within the time and in the manner required by the acts of Congress granting lands to the Territory and State of Minnesota to aid in the construction of said railroads, to wit, an act of the said Congress entitled "An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands, in alternate sections, to the State of Alabama to aid in the construction of certain railroads in said State," approved March 3rd, 1857; and a certain other act thereof entitled "An act extending the time for the completion of certain land grant railroads in the States of Minnesota and Iowa, and for other purposes," approved M'ch 3, 1865; and a certain other act thereof entitled "An act authorizing the Saint
259 Paul and Pacific Railroad Company to change its lines in consideration of a relinquishment of lands," approved March 3rd, 1871, and the acts of the Legislature of said State of Minnesota executing the trust created by the said acts of Congress, or in relation to the disposition of the lands therein mentioned, to wit, an act of the said Legislature entitled "An act to facilitate the construction of the Minnesota and Pacific railroad, and to amend and continue the act of incorporation relating thereto," approved March 10th, 1862, and acts amendatory thereof, or relating to the railroad therein described, approved, respectively, February 6th, 1864, March 4th, 1864, and March 2nd, 1865, or such other acts as shall or may hereafter be passed by the said Congress and the said Legislatures, respectively, so that the said party of the second part shall and may become vested, under the said acts, with the legal title to all and singular the lands thereby granted to aid in the construction of the said railroads, or either of them; that is to say, the said party of the first part shall and will, within the time aforesaid, and so as to perfect the title of the said party of the second part to the said lands,
260 construct and grade the said railroads in sections of ten miles, lay the same with iron rails, as required by law, with all necessary switches, side tracks, and turnouts, erect and build upon & in connection therewith all necessary bridges, viaducts, culverts, fences, and other structures, and all depots, stations, station-houses, car-houses, engine-houses, freight-houses, wood-houses, machine and other shops, and put upon and appropriate to the use of the said rail-

road, free from all incumbrances, except the deed of trust or mortgage hereinafter mentioned, all locomotives, tenders, passenger, baggage, freight, and other cars, and other rolling-stock which may be necessary and proper to accommodate the business thereof, and in all respects construct, complete, furnish, and equip the said railroads, so that the same shall be in respect to the road-bed, rails, and superstructure thereof, and so far as the business shall require in respect to the equipment thereof and the facilities in the transaction of business, in good order and condition, and equal in all re-
261 spects to the railroad heretofore constructed by the said party of the first part between St. Paul and Watab; and the said party of the first part undertakes such construction and equipment of said railroads on the following terms and conditions; that is to say:

The said party of the first part shall execute, issue, and offer for sale and negotiation a series of bonds, amounting in the aggregate to fifteen million of dollars, and consisting of fifteen thousand bonds of one thousand dollars each, & bearing date the 1st day of April, in the year one thousand eight hundred and seventy-one, and payable on the first day of January, in the year one thousand nine hundred and one, in lawful money of the United States, in the city of New York, or in British pounds sterling in the city of London, at the rate of four British shillings per dollar at the option of the holder, and bearing interest at the rate of seven per centum per annum, payable semi-annually in the lawful money of the United States if demanded in New York, or in British pounds sterling if demanded in London aforesaid, at the option of the holder of
262 the coupons representing the same; and the said party of the second part shall and will for the benefit of the parties who may become holders of the said bonds assume and secure the payment thereof by the execution and delivery to trustees of a deed of trust or mortgage of and upon all and singular the said railroads so to be constructed with their respective equipments, appurtenances, and franchises, and also of and upon all right, title, and interest now held and hereafter to be acquired by the said party of the second part in and to the lands granted, or to be granted, by Congress as aforesaid to aid in the construction of said railroads, or either of them, which deed of trust or mortgage shall be in the most approved form for the purpose of securing the payment of said bonds and all interest to accrue thereon, and subject to said deed of trust or mortgage, but not otherwise, the said party of the second part shall execute and deliver to the said party of the first part, and the said party of the first part shall receive and accept a lease of the said railroad for the term of ninety-nine years, the said party of the first part agreeing
263 to operate, maintain, and supply from time to time with all necessary and proper equipment the said railroads, and to apply semi-annually any and all net earnings and income of the said railroads to the payment as the same shall fall due of the interest on said bonds, and if in any year after paying in full out of the said net earnings all interest on said bonds which shall have become due a balance of the said nett earnings shall remain to pay

over the same to the trustees for the time being under the deed of trust or mortgage aforesaid securing the payment of said bonds, to be by the said trustees used and applied in the payment of interest on said bonds, and the redemption of the principal thereof, in the manner provided in said deed of trust or mortgage in reference to the net proceeds of the sales of the lands grantees by Congress to aid in the construction of said railroads therein mentioned: Provided, however, That when all the bonds aforesaid shall have been fully paid and satisfied, principal as well as interest, or due provision made in money for the payment thereof, then, and from thenceforth,
264 all net earnings of the said railroads, or either of them, remaining in any year after paying the expenses of operating and maintaining the said railroads during such year, and carrying on the business thereof, shall, within a reasonable time after the close of such year, be paid over to the said party of the second part, to an amount equal, so far as such net earnings may suffice, to a dividend of six per centum upon the whole aggregate amount of the capital stock of the said party of the second part now issued and outstanding.

II. The said party of the second part agrees to suffer and permit the said party of the first part to enter into and upon the said railroads for the purpose [of] constructing, completing, and equipping the same as aforesaid, and for that purpose to exercise all the rights, privileges, and franchises of the said party of the second part in respect thereto; and the said party of the second part promises and agrees to execute upon said railroads and upon its title and
265 interest in the lands granted or to be granted by Congress as aforesaid, a deed of trust or mortgage as aforesaid, and subject to such deed of trust or mortgage and to all and singular the provisions and requirements thereof, to lease the said railroads to the said party of the first [part], and suffer and permit the said party of the first part to operate, maintain, and enjoy the said railroads for and during the said term of ninety-nine years, applying the net earnings or income thereof as hereinbefore stated.

In witness whereof, the said parties of the first and second parts have caused their respective corporate seals to be hereunto affixed and the same to be attested by the signatures of their respective presidents and secretaries, the day and year first-above written.

(Signatures omitted.)

Signed and sealed and delivered in the presence of—
CHARLES NETTLETON.

266 "EXHIBIT B."

*Lease.*

This indenture, made the first day of April, in the year of our Lord one thousand eight hundred and seventy-one, by and between the Saint Paul and Pacific Railroad Company, a corporation of the State of Minnesota, of the first part, and the First Division of the

Saint Paul and Pacific Railroad Company, a corporation of the same State, of the second part, witnesseth:

Whereas the said party of the second part has, by an agreement bearing even date herewith, contracted and agreed to assume and undertake the construction of the lines of railroad which the said party of the first part is by law authorized to construct, maintain, and operate in the said State of Minnesota from some point at or near Saint Cloud, in the county of Stearns, to Saint Vincent, in the county of Pembina, being a distance of two hundred and ninety-three (293) miles, more or less, and from Watab, in the county of Benton, to Brainerd, in the county of Crow Wing, being a distance of fifty-five (55) miles, more or less, and to complete, equip,
267 and put the same and *and* every part thereof in good running order and condition within the time and in the manner required by the acts of Congress granting lands to the Territory and State of Minnesota to aid in the construction of said railroads, to wit, an act of the said Congress entitled "An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands, in alternate sections, to the State of Alabama to aid in the construc- of certain railroads in said State," approved March 3rd, 1857, and a certain other act thereof entitled "An act extending the time for the completion of certain land-grant railroads in the States of Minnesota and Iowa, and for other purposes," approved March 3rd, 1865, and a certain other act thereof entitled "An act authorizing the Saint Paul and Pacific Railroad Company to change its lines, in consideration of a relinquishment of lands, approved March 3rd, 1871; and the acts of the Legislature of said State of Minnesota executing the trusts created by the said acts of Congress, or in relation to the disposition of the lands therein men-
268 tioned, to wit, an act of the said Legislature entitled "An act to facilitate the construction of the Minnesota and Pacific railroad and to amend and continue the act of incorporation relating thereto," approved March 10th, 1862, and acts amendatory thereof or relating to the railroad therein described, approved, respectively, February 6th, 1864, March 4th, 1864, and March 2nd, 1865, or such other acts as shall or may hereafter be passed by the said Congress and the said Legislature, respectively, so that the said party of the first part shall and may become vested under the said acts with the legal title to all and singular the lands thereby granted to aid in the construction of the said lines of railroad, or either of them.

And whereas the said party of the second part in and by such contract agreed to execute, issue, and offer for sale and negotiation a series of bonds amounting in the aggregate to fifteen millions of dollars, and consisting of fifteen thousand bonds of one thou-
269 sand dollars each, bearing date on the first day of April, in the year one thousand eight hundred and seventy, and payable on the first day of January, in the year one thousand nine hundred and one, in lawful money of the United States in the city of New York, or in British pounds sterling in the city of London, at

the rate of four British shillings per dollar, at the option of the holder, and bearing interest at the rate of seven per centum per annum, payable semi-annually, in the lawful money of the United States if demanded in New York, or in British pounds sterling if demanded in London aforesaid, at the option of the holder of the coupons representing the same; and the said party of the first part agrees, for the benefit of the parties who may become holders of the said bonds, to assume and secure the payment thereof by the execution and delivery to trustees of a deed of trust or mortgage of and upon all and singular the said lines of railroad so to be constructed, with their equipments, appurtenances, and franchises, and also of and upon all right, title, and interest now held
270 and hereafter to be acquired by the said party of the first part in and to the lands granted by Congress as aforesaid to aid in the construction of said lines of railroad and subject to said deed of trust or mortgage, but not otherwise, to execute and deliver to the said party of the second part a lease of the said lines of railroad for the term of ninety-nine years, the said party of the second part agreeing — operate, maintain, and from time to time supply, with all necessary and proper equipment, the said railroad, and to apply semi-annually any and all net earnings and income thereof to the payment in the first place of the interest on said bonds as the same shall fall due, and if in any year after paying in full out of the net earnings all interest on said bonds which shall have become due a balance or surplus of the said net earnings shall remain to pay over the same to the trustees for the time being, under the deed of trust or mortgage aforesaid, receiving the payment of said bonds to be by the said trustees used and applied in the payment of interest on said bonds and the redemption of the principal thereof in the manner
271 provided in said deed of trust or mortgage, in reference to the net proceeds of the sales of the lands granted by Congress to aid in the construction of said railroads therein mentioned: Provided, however, That when all the bonds aforesaid shall have been fully paid and satisfied, principal as well as interest, or due provision made in money for the payment thereof, then and from thenceforth all net earnings of the said railroads, or of either of them, remaining in any year after paying the expenses of operating and maintaining the said railroads during such year, and carrying on the business thereof, shall within a reasonable time after the close of such year be paid over to the said party of the first part to an amount equal, so far as such net earnings may suffice, to a dividend of six per centum upon the whole aggregate amount of the capital stock of the said party of the first part now issued and outstanding.

And whereas the said party of the second part has duly executed the series of bonds aforesaid to the amount of fifteen mill-
272 ions of dollars, and is about to endeavor to negotiate the same for the purpose of procuring the means necessary to construct and equip said lines of railroad, in pursuance of the said construction contract and in conformity therewith, and the said party of the first part, in like conformity to said contract, has duly executed and de-

livered the deed of trust or mortgage securing the payment of said bonds in the said construction contract mentioned.

Now, therefore, this indenture witnesseth that the said party of the first part, for and in consideration of the premises, and of the sum of one dollar to it duly paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, demised, and leased, and by these presents doth grant, demise, and lease, unto the said party of the second part, its successors and assigns, all and singular the railroads aforesaid which the said party of the first part is authorized to construct from a point at or near Saint Cloud aforesaid to Saint Vincent, in the said State of Minnesota,
273 and from Watab aforesaid to Brainerd, in the same State; together with the appurtenances of the said railroads respectively, and the rights, privileges, and franchises thereunto belonging or in anywise appertaining, or which shall or may at any time hereafter thereunto belong or in anywise appertain. To have and to hold the said railroads unto the said party of the second part, its successors and assigns, for and during the term of ninety-nine years from the date hereof, it and they keeping and performing the covenants and making from time to time the payments mentioned in these presents to be by it or them kept, performed, or made.

And the said party of the second part, for itself, its successors and assigns, covenants, promises, and agrees to and with the said party of the first part that the said party of the second part, its successors and assigns, shall and will construct the said lines of railroad to be constructed as aforesaid from Saint Cloud to Saint Vincent and from Watab to Brainerd in the time and in the manner hereinbefore mentioned, and shall
274 and will from time to time, and as the same may be needed, procure and supply for use upon the said roads, respectively, any and all rolling-stock, equipments, and materials whatsoever which shall or may be necessary and proper for the purpose of transacting the business of the said railroads, or either of them; and it is understood and agreed, and hereby declared, that any and all rolling-stock, equipment, and materials whatsoever which, pursuant to this lease or otherwise, shall or may be acquired or furnished for the use of the said railroads, or either of them, by the said party of the second part, its successors or assigns, shall, by the mere acquisition thereof for such use, become and be part and parcel of the property granted by the deed of trust or mortgage aforesaid bearing even date herewith, made by said party of the first part to secure said issue of bonds of the said party of the second part to the amount of fifteen millions of dollars, and become and be in all respects subject to the lien and operation thereof in the same manner
275 and with the same effect as if such property had been acquired by the said party of the first part hereto, for such use as is also provided and declared in the fifteenth article of the said deed of trust or mortgage, and that the said party of the second part, its successors or assigns, shall and will operate and maintain the said lines of railroad for the said term of ninety-nine years in the man-

ner hereinbefore mentioned, subject always, however, to the deed of trust or mortgage aforesaid, and all and singular the provisions thereof, and the powers, rights, and authorities therein granted, and that it or they shall and will in each and every year, and at all times during said term, until the bonds aforesaid shall be fully paid and satisfied, use and apply the net earnings made or derived from the said lines of railroad, or either of them, or the business of the same, in and to the payment in the first place of the interest on the bonds aforesaid, as such interest shall semi-an-
276 nually become due and payable, and, if in any year after the payment of such interest a surplus or balance of such net earnings shall remain, pay over such surplus or balance to the trustees for the time being under the deed of trust or mortgage aforesaid securing the payment of said bonds, to be by the said trustees used and applied in the payment of interest on said bonds and the redemption of the principal thereof, in the manner provided in said deed of trust or mortgage, in reference to the net proceeds of the sales of the lands granted by Congress to aid in the construction of said railroads therein mentioned: Provided, however, That when all the bonds aforesaid shall have been fully paid and satisfied, principal as well as interest, or due provision made in money for the payment thereof, then and from thenceforth all net earnings of the said railroads, or of either of them, remaining in any year after paying the expenses of operating and maintaining the said railroads during such year, and carrying on the
277 business thereof, shall, within a reasonable time after the close of such year, be paid over to the said party of the first part to an amount equal to a dividend of six per cent. on the existing capital stock of the said party of the first part, as aforesaid, so far as such balance may suffice, and that the said party of the second part, its successors and assigns, shall and will do and perform any and every act and thing mentioned or required in the deed of trust or mortgage aforesaid to be by it or them done or performed, and at the end of the said term, or other sooner determination of this lease, surrender up the said premises to the said party of the first part, its successors or assigns.

And the said party of the second part further covenants, promises, and agrees to and with the said party of the first part that the said party of the second part, its successors or assigns, shall and will, within a reasonable time after the expiration of each and every calendar year during the term aforesaid ensuing the date
278 hereof, furnish to the said party of the first part, its successors or assigns, full, true, and detailed statements of the earnings of said railroads and the expenses of operating and maintaining the same during such year, and that any and all books of account and vouchers containing, or purporting to contain, the accounts or entries of such earnings or the expenses of the said railroads, or either of them, shall, at all reasonable hours and times, be open to the inspection of the said party of the first part, its successors or assigns, with the right to take transcripts therefrom.

In witness whereof, the said parties of the first and second parts

have caused their respective corporate seals to be hereunto affixed, and the same to be attested by the signatures of their respective presidents and secretaries, the day and year first above written.

Signed, sealed, and delivered in presence of—

———— ————.

278½ Endorsed: "Filed July 14th, 1873. H. E. Mann, clerk."

279 In the Circuit Court of the United States for the District of Minnesota. In Equity.

To the honorable judges of said court, sitting in equity:

John S. Kennedy, Henry M. Baker, and John S. Barnes, who are citizens and inhabitants of the State of New York, bring this their supplemental bill, by leave of this court heretofore granted, on behalf of themselves and all others, bondholders under the mortgage hereinafter referred to, who may come in and seek relief by and contribute to the expense of this suit against the First Division of the St. Paul and Pacific Railroad Company (hereinafter designated the First Division Company), and the St. Paul and Pacific Railroad Company (hereinafter designated the St. Paul and Pacific Company), corporations created and existing under the laws of the State of Minnesota, and citizens of the State of Minnesota, and other defendants named in the original bill, hereafter referred to.

And thereupon your orators complain and say that they filed
280 their original bill against said defendants and others, as by said original bill fully appears, in this court July 14, 1873, on behalf of themselves and all others, bondholders as aforesaid, wherein they prayed for the appointment of a receiver of the property and effects of the said First Division Company, and said St. Paul and Pacific Company, and for an account of and concerning the bonds issued under and secured by the mortgage of April first, 1871, and annexed to said original bill, and marked Exhibit "C," and of and concerning the proceeds of the sales of said bonds, and that such receiver be empowered to borrow money and complete said lines of road covered by said mortgage, and for general relief.

That said court, upon application therefor, appointed one J. P. Farley a receiver of the property and effects of the said St. Paul and Pacific Company, who gave bond and accepted said trust.

That your orators thereafter, by leave of this court, amended their said original bill by charging the trustees named in said mort-
281 gage, George L. Becker and Wm. G. Moorhead, defendants also in said action, with a violation of their said trust, in a misappropriation of a large amount of the proceeds of the bonds issued under and secured by said mortgage, and praying that they be removed from said trusteeship, and for a decree against them personally for the sum so by them misappropriated.

That said defendants demurred to said original bill, as amended, which demurrers have been duly set down for argument, but have not yet been heard, all of which matters fully and at large appear by the files, records, and proceedings in said action in this court.

And your orators further show that since the filing of said original bill and the aforesaid proceedings had in said action, namely, on the first day of January, 1875, default has been made in the payment of the semi-annual installment of interest due at that date on the said bonds issued and negotiated under and secured by the said mortgage, bearing date April first, 1871, and a copy of which
282 mortgage is annexed to said original bill and marked Exhibit "C," and that a like default has been made in the payment of the interest due upon said bonds July first, 1875.

That no money or other means were provided to meet the said interest which become due January first or July first, 1875, at the time or place when or where the same was payable, or since, by said railroad companies, or either of them, or any one else.

That on the said first day of January, 1875, your orators caused seven thousand five hundred and thirty-nine coupons or interest warrant, and amounting to two hundred and sixty-three thousand eight hundred and sixty-five dollars, due at that date upon said bonds and held by your orators in their own right, or as agents for others, to be presented for payment at the banking-house of Robert Benson & Co., London, England, and payment thereof duly demanded, with an offer to surrender up said coupons upon such payment, but that payment thereof was refused for want of funds, none having been provided therefor, and that said coupons or in-
283 terest warrants were thereupon duly protested for non-payment.

That your orators are still the owners and holders of a portion of said bonds secured by said mortgage, and are the agents and empowered to act in the premises for and on behalf of a large majority of the holders and owners of said bonds.

Wherefore your orators pray that in addition to the relief demanded in said original as amended as aforesaid the defendants, the said First Division Company and the St. Paul and Pacific Company, and each of the other defendants named in said original bill, may make full, true, and perfect answers to all and singular the statements and matters above herein set forth, but not upon oath, an answer under oath being hereby waived, according to the best of their knowledge, information, and belief.

That the whole principal sum of said bonds may be decreed to be immediately due and payable, and that an account may be taken, by and under the direction and decree of this honorable court, of what is due and owing upon said bonds and mortgage, principle, and interest; and that each and all of said defendants, and
284 all persons claiming under them, or either or any of them, may be barred and foreclosed of and from all right, claim, lien, and equity of redemption in and to said mortgaged property and every part thereof; and that said mortgaged property, including everything embraced within and covered by said mortgage, may be sold under decree of this court, and that the proceeds arising therefrom, after payment of costs and expenses of this suit and of such sale, be apportioned *pro rata* and applied upon said bonds as payment thereon to that extent; and that the said First Division

Company and said St. Paul and Pacific Company may be adjudged to pay any deficiency which may remain due upon said bonds, after applying all of said moneys so applicable thereon; and that your orators may have such other and further relief in the premises as may seem proper and shall be agreeable to equity and good conscience.

May it please your honors to grant unto your orators a writ of subpœna to be directed to the said First Division Company, and to the said St. Paul and Pacific Company and the other defend-
285 ants named in said original bill, thereby commanding them and each of them, at a certain day and under a certain penalty therein to be specified, to appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand to and perform and abide by such order and decree therein as to your honors shall seem meet; and your orators will ever pray.

GEO. L. OTIS AND
GILMAN, CLOUGH & LANE,
*Solicitors and of Counsel for Complainants.*

UNITED STATES OF AMERICA,
*Southern District of New York:*

John S. Barnes, being duly sworn, deposes and says: That he is one of the complainants in the foregoing supplemental bill and in the original bill therein referred to, and that he has read the said foregoing supplemental bill, and that the same is true of his own knowledge, except as to matters which are therein stated upon information and belief, and that as to those matters he believes it to be true.

286 JOHN S. BARNES.

Subscribed and sworn to before me, this 28th day of July, 1875.
[SEAL.] EDWARD L. OWEN,
*U. S. Commissioner for the* the *Southern Dist. of New York.*

Endorsed: "Filed August 2nd, 1875. H. E. Mann, clerk."

287 *Term Minutes.*

United States Circuit Court for the District of Minnesota. December Term, A. D. 1885.

DECEMBER 18, 1885.

Present: Hon-. John F. Dillon and Rensselaer R. Nelson, judges.

JOHN S. KENNEDY *et al.*
*vs.*
THE NORTHERN PACIFIC RAILROAD COMPANY *et al.*

And now come the plaintiffs, and by leave of the court, defendants, by their counsel, consenting, withdraw their supplemental bill of complaint, and it is by the court ordered that the same be, and it is hereby, dismissed, but without prejudice.

And it is further ordered, the parties, by their counsel, consenting, that the demurrers to the plaintiffs' amended bill of complaint be, and the same are, continued until the next term of this court.

And it is further ordered that the motion to make certain trustees parties plaintiffs be withdrawn, the parties consenting.

It is further ordered, the parties consenting, that the hearing, on the motion of the plaintiff for the surrender of certain property to the receiver appointed by the court, herein be, and the same is hereby, continued until the next term of the court.

288 United States Circuit Court, District of Minnesota. In Equity.

JESSE P. FARLEY
*vs.*
NORMAN W. KITTSON, J. J. HILL, and THE ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY.

To the Honorable the Supreme Court of the United States:

Jesse P. Farley, complainant in the above-entitled cause, and who is also appellant therein, respectfully showeth:

That on the 13th day of November, A. D. 1880, he filed his bill in equity in the circuit court of the United States for the district of Minnesota against the above-named defendants, who are appelle-s herein, setting forth certain alleged trusts in relation to certain bonds of the First Division of the St. Paul and Pacific Railroad Company, and certain other bonds of the St. Paul and Pacific Railroad Company, arising from certain agreements, as to certain bonds in said bill stated, as existing between complainant and said de-
289 fendants, Kittson and Hill, and asking the enforcement of said trusts against said defendants and said defendant, The St. Paul, Minneapolis and Manitoba Railway Company, to which said bill a demurrer was filed by said railway company, which was overruled, and to which was filed a plea in bar by said defendants, Kittson and Hill, which was subsequently joined in by said defendant railway company; that on the 15th day of July, A. D. 1882, said circuit court sustained said plea as to all of said defendants and entered a final decree dismissing said bill, and that the property in controversy in said cause exceeds the sum or value of one hundred thousand dollars.

Wherefore this appellant appeals from the whole of said decree of said circuit court of the United States, and respectfully prays that the decree of the said circuit court and the bill, answer, pleadings, depositions, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear said cause anew, and
290 that the decree of said circuit court and every part thereof may be reversed, and a decree made overruling said plea, with costs, or such other decree as to said Supreme Court shall seem just.

JESSE P. FARLEY,
*Petitioner.*
GRIFFITH & KNIGHT,
*Att'ys for Plaintiff.*

291 In the Supreme Court of the United States.

JESSE P. FARLEY
*vs.*
NORMAN W. KITTSON, JAMES J. HILL, and THE ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY.

Know all men by these presents, that we, Jesse P. Farley and John Bell, as surety, are held and firmly bound unto Norman W. Kittson, James J. Hill, and The Saint Paul, Minneapolis and Manitoba Railway Company in the sum of one thousand ($1,000) dollars, to be paid to said Norman W. Kittson, James J. Hill, and the Saint Paul, Minneapolis and Manitoba Railway Company, their executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by this presents.

292 Sealed with our seals. Dated this ninth day of August, A. D. 1882.

Whereas the above-named Jesse P. Farley hath taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the district of Minnesota: Now, therefore, the condition of this obligation is such that if the above-named Jesse P. Farley shall prosecute his said appeal to effect, and pay all costs that may be adjudged against him if he fail on said appeal, or fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

JESSE P. FARLEY.
JOHN BELL.

DISTRICT OF IOWA, *U. S. of America:*

293 I, John Bell, being duly sworn, do depose and say: That I am a resident of Dubuque, in the State of Iowa, and that I am worth the sum of one thousand dollars, the amount of the penalty described in the foregoing bond, over and above all my debts, liabilities, & all exemptions allowed by law, and that I have property, unencumbered, in the State of Iowa, subject to execution, exceeding said amount, and that I am a freeholder in said State.

JOHN BELL.

Subscribed and sworn to before me by John Bell, this 9th day of August, A. D. 1882.

[SEAL.] H. K. LOVE,
*Clerk U. S. Circuit & Dist. Courts for Dist. of Iowa,*
By ALFRED HOBBS, *Deputy.*

DISTRICT OF IOWA, *ss:*

I, Alfred Hobbs, deputy clerk, as aforesaid, do hereby certify that John Bell, the surety to this bond, is personally well known to me,

and his financial standing in the community is the very best. I would accept his bond or note for $30,000, or over.

294 [SEAL.] ALFRED HOBBS,
*Deputy Clerk U. S. Dist. & Circuit Courts, Dist. of Iowa.*

The within and foregoing bond is approved and appeal allowed this 25th day of August, A. D. 1882.

GEO. W. McCRARY.
*Circuit Judge.*

295 UNITED STATES OF AMERICA, *ss:*

To Norman W. Kittson, James J. Hill, and The St. Paul, Minneapolis and Manitoba Railway Company:

You are hereby cited to appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, 1882, to answer to an appeal by Jesse P. Farley from a decree of the circuit court of the United States for the district of Minnesota, made in a cause wherein said Jesse P. Farley was complainant, and you, Norman W. Kittson, James J. Hill, and The St. Paul Minneapolis, and Manitoba Railway Company were defendants, and to show cause, if any there be, why said decree should not be reversed and set aside, and such further proceedings as to said Supreme Court shall appear conformable to the right therein.

In testimony whereof I hereunto set my hand this 25th day of August, one thousand eight hundred and eighty-two.

GEO. W. McCRARY,
*Circuit Judge.*

296 [Endorsed:] Jesse P. Farley *vs.* N. W. Kittson, J. J. Hill, and The St. P., M. and M. R'y Co. Citation. Service of copy of the within citation Nov'r 20th, 1882, is hereby acknowledged. Geo. B. Young, R. B. Galusha, solicitors for def'ts, Kittson & Hill. Bigelow, Flandreau & Squires, solicitors for def't railway company.

297 UNITED STATES OF AMERICA, } *ss:*
*District of Minnesota,* }

Circuit Court of the United States.

I, H. E. Mann, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing, consisting of 296 pages, numbered consecutively from 1 to 296, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final decree, and all other proceedings in said cause, and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Saint Paul, in the district of Minnesota, this

5th day of February, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and seventh year.

[Minnesota U. S. Circuit Court seal.] H. E. MANN, *Clerk*,
By O. J. REYNOLDS,
*Deputy Clerk.*

298 [Endorsed:] United States circuit court, district of Minnesota. Jesse P. Farley *vs.* Norman W. Kittson *et al.* Return to Supreme Court.

Endorsed on cover: Minnesota C. C. U. S. No. 197. Jesse P. Farley, appellant, *vs.* Norman W. Kittson, James J. Hill, and The St. Paul, Minneapolis, and Manitoba Railway Company. Filed 27th February, 1883.

12-303

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# Supreme Court of the United States

OCTOBER TERM 1885.

**No. 197.**

JESSE P. FARLEY, Appellant,

*vs.*

NORMAN W. KITTSON, JAMES J. HILL, and THE ST. PAUL, MINNEAPOLIS and MANITOBA RAILWAY COMPANY.

Points Submitted by Mr. EDMUNDS for Appellant.

*Thomas McGill & Co., Law Printers, Washington, D. C.*

## POINTS

### Submitted by Mr. Edmunds for Appellant.

---

I.

Farley, being receiver of the St. Paul Road, had a right to purchase bonds and hold them.

So holding them, he could lawfully become a stockholder in a new corporation founded on the bonds.

II.

Farley, being manager under the trustees in possession of the First Division Road, had a right to buy and hold bonds of that corporation.

So holding, he could lawfully be a stockholder in a corporation founded on the bonds which should buy the property at a foreclosure sale.

III.

It does not appear that Farley was a receiver, in the suits wherein the decrees of foreclosure were passed. It appears there were five such suits, and it is nowhere alleged in the bill, or plea, that there was any foreclosure in the suit in which he was appointed receiver, the main ob-

ject of which was for quite a different purpose, although the bill does contain a prayer that the extension mortgage may be foreclosed. (Copy of this bill is found page 52 of the Record.)

## IV.

Farley was not a party to any of the suits and had no different legal connection with the First Division Road, of which he was manager, than that of a yard-master or an engine-driver. He was simply employed by the trustees in possession to operate the line as a working concern.

## V.

Farley had no relations whatever with the foreclosure decrees or sales, and no control over them, and occupied no place of trust concerning either. He was neither trustee under the mortgages, nor solicitor, nor master to sell. He was merely a person appointed by the court to hold the possession of the St. Paul Road and to operate it pending the suits. And he was merely an employee in charge of the First Division Road, under the trustees in possession.

## VI.

The bill alleges perfect honesty and good conduct on his part in all his operations connected with the management of the property, and that the representative of the great mass of the bondholders knew and approved of his being interested in buying the bonds before the sale of them was concluded.

The bill also alleges that the purchase on nearly all the bonds was with the express stipulation that the sellers should have the option to decide after the sale, and after the foreclosure, whether they would take the price of the bonds in cash or come into the new company.

These allegations are not denied in the plea.

## VII.

The plea alleges no actual fraud or evil intent, but stands solely on the ground that the position of Farley, as receiver of one road and manager of the other, operated in law to render him incapable of being interested in buying bonds and coming into the new company.

The only issue of fact raised by the plea was whether Kennedy, the trustee and agent of the bond-holders, had notice of Farley's interest.

This was proved without contradiction by Farley and by Kennedy's letter. The only scintilla of evidence claimed by the defendants as tending to show any corrupt conduct by Farley is his statement in his testimony, entirely outside of the issue formed on the record, that his interest in the bonds and their purchase was not made known to the

court, and not earlier stated to Kennedy, and his motives in keeping it secret.

If in law he had a right to be interested, the fact that his interest was kept secret cannot change the case, unless in connection with proof of some misrepresentation made by him to the parties in interest, of which there is no pretence even.

The motive he states in his testimony for silence was, under the circumstances stated by him, a pardonable one at least. It was a fear that a rival line and railroad raiders holding some of the worthless stock of the company might make it a pretext to get a change of receivers, and so destroy the value of the property by similar wastefulness and corrupt contrivances appearing to have taken place before. If the receivership had been changed, his relations with the defendants would have remained the same.

## VIII.

There is no allegation or suggestion of evidence that the bondholders sold their bonds for less than they were worth at the time. And it appears that the great mass of them had the right, if they chose, to come into the new company after the sale, but did not choose to do so. This fact alone would conclusively repel every presumption or suspicion even of fraud in fact, as well as of fraud in law. The bondholders had the right, after all was completed and the new company organized and in possession of the property, either to take their cash or to remain interested as first mortgage creditors of the whole property. In this state of things it seems impossible to conceive that it is within the competence of the defendants to exclude Farley from any

interest in the new corporation on the ground of his preceding connection with the property and in violation of their admitted agreement.

## IX.

No bondholder, no stockholder, no trustee, no creditor complains. All were and are satisfied with the sale. The defence, therefore, have no standing to set up such a defence as they have—not a defence of an agreement corrupt and wicked in fact, but a defence of incompatability of Farley's position with the agreement between them.

## X.

As to the whole First Division property, Farley had no relation other than that of an employee to work the line under the trustees in possession, and it is insisted that he had the same right to engage in buying bonds and in bidding at the foreclosure sale that any other person would have. His employment and duties had no connection with bonds or lawsuits whatever. In respect of this First Division property, therefore, (if there are any difficulties with the other,) he is at all events entitled to an account.

GEO. F. EDMUNDS,
*of Counsel for the Appellant.*

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CLERK.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1885.

*No.* 197.

JESSE P. FARLEY *Appellant,*

*vs.*

NORMAN W. KITTSON, JAMES J. HILL AND THE ST. PAUL MINNEAPOLIS AND MANITOBA RAILWAY COMPANY.

*Appeal from the Circuit Court of the United States for the District of Minnesota.*

## BRIEF AND ARGUMENT FOR APPELLANT.

HENRY D. BEAM,
EDWARD D. COOKE,
*Appellant's Solicitors.*

GEORGE F. EDMUNDS,
*Of Counsel.*

PRINTED BY THE CHICAGO LEGAL NEWS CO., 175 MONROE ST.

# Supreme Court of the United States

OCTOBER TERM, 1886.

***No. 197.***

JESSE P. FARLEY, *Appellant*,

*vs.*

NORMAN W. KITTSON, JAMES J. HILL AND THE ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY.

*Appeal from the Circuit Court of the United States for the District of Minnesota.*

## BRIEF AND ARGUMENT FOR APPELLANT.

### STATEMENT OF THE CASE.

This is a bill filed by appellant, who was complainant below, to compel a discovery, accounting, and the delivery to him of certain stock, funds and property in the hands of the defendant, the Manitoba Railway Company, the proceeds and profits of a joint undertaking carried out between the complainant and defendants. The case grows out of the sale under foreclosure decrees of the railroad lines and other property of the St. Paul and Pacific R. R. Co., and the First Division of the St. Paul and Pacific R. R. Co., and the acquisition thereof by the defendant, the St. Paul, Minneapolis and Manitoba Railway Company, through the use of certain mortgage bonds, purchased and held by defendants, Kittson and Hill, for the joint account, use and benefit of

themselves and complainant, under an agreement and contract which is not denied. The facts shown by the record are substantially as follows:

The St. Paul and Pacific Railroad Company, hereinafter styled the St. Paul Company, was organized under an Act of the legislature of Minnesota, entitled "An Act to facilitate the construction of the Minnesota and Pacific Railroad, and to amend and continue the act of incorporation relating thereto," approved March 10, 1862; and was authorized to construct and operate a line of railway, from Stillwater, via St. Paul, St. Anthony and Minneapolis, to the town of Breckinridge; with a branch from St. Anthony, via Anoka, St. Cloud and Crow Wing, to St. Vincent; and was granted, to aid in the construction of said lines, six sections of land per mile, which had been theretofore granted to the Territory of Minnesota by Act of Congress, approved March 3, 1857. (Rec. p. 54.)

Thereupon the St. Paul Company issued bonds aggregating $2,020,000, secured by mortgages on its main line from St. Paul to St. Anthony, and on its branch line from St. Anthony to Watab, with equipments, franchises, land grant, etc. (Rec. p. 55.)

The First Division of the St. Paul and Pacific Railroad Company, hereinafter styled the First Division Company, was incorporated by act of the legislature of Minnesota, entitled "An Act to amend the charter of the St. Paul and Pacific R. R. Co.," approved February 6, 1864; and about that date became the owner of all the property of the St. Paul Company, including its main and branch lines; and thereupon, for the purpose of retiring the former issues, as well as of raising funds to complete the roads, issued bonds amounting to $2,800,000, October 1, 1865, secured by mortgage on its branch line from St. Paul to Watab, land grants, etc. The greater part of said prior issues were retired; but nearly all the $2,800,000 issue were outstanding in July, 1873, there being then outstanding in all, on the branch line $2,750,000. (Rec. p. 56.)

The First Division Company also issued mortgage bonds

March 1, 1864, viz.: $1,500,000 and $3,000,000, on its main line from St. Anthony, 150 miles westward, with franchises and land grant of six sections per mile.

By Act of Congress, approved March 3, 1865, the St. Paul Company became entitled to ten sections of land per mile (including the six sections originally granted), to aid in construction of railroads from St. Cloud, via Crow Wing, to St. Vincent, and from St. Cloud to the waters of Lake Superior (Rec. p. 57); and thereupon the First Division Company issued mortgage bonds, viz.:

1. An issue of $6,000,000, July 1, 1868, on its main line from St. Anthony to Breckinridge, 210 miles, with land grant of 10 sections per mile. This issue was used to retire the $1,500,000 issue above; and of the $3,000,000 and $6,000,000 issues, there were outstanding in July, 1873, about $8,950,000. (Rec. p. 58.)

2. An issue of $3,000,000, December 1, 1870, on the main line and land grant; but of this amount only $1,500,000, was ever issued, and that was issued in fraud of creditors, to one E. D. Litchfield in payment for certain stock held by him in the First Division Company, and by him transferred to the Northern Pacific R. R. Company.

By act of Congress, approved March 3, 1871, it was provided that the St. Paul Company might so change its branch lines that instead of constructing roads from Crow Wing to St. Vincent and from St. Cloud to the waters of Lake Superior, it might locate and construct a continuation of its branch line from Crow Wing to Brainerd, to intersect with the Northern Pacific Railroad, and a second branch from St. Cloud, via Otter's Tail or Rush Lake, so as to form a more direct route to St. Vincent, with the same proportionate land grant as before. (Rec. p. 58.)

On April 1, 1871, the St. Paul Company entered into an agreement with the First Division Company, whereby the latter was to construct and equip the St. Vincent and Brainerd Extensions from St. Cloud to St. Vincent, about 293 miles, and from Watab to Brainerd, about 55 miles; and to complete and put the same in good running order within

the time, and in the manner required by the acts of Congress and of the State of Minnesota, so as to vest in the St. Paul Company the title to the land grants; and the First Division Company was to receive a lease of said extensions for the term of 99 years, and was to issue $15,000,000 of bonds, the proceeds of which were to be applied to such construction and equipment, and which were to be secured by a trust mortgage, herein commonly called the Extension Mortgage, executed by the St. Paul Company, covering the St. Vincent and Brainerd Extension Lines, equipments, franchises, land grant, etc.

These instruments, the construction contract, the lease and the extension mortgage, were all executed on the same day and form part of one transaction. (Rec. p. 59.)

On July 14, 1873, John S. Kennedy et al., Trustees, in behalf of the bondholders under these various mortgages, filed a bill in the Circuit Court of the United States for the District of Minnesota, against the Northern Pacific R. R. Co., the St. Paul Company, the First Division Company and the trustees in the several mortgages, for the appointment of a receiver of the Extension Lines belonging to the St. Paul Company. (Rec. p. 52.)

At that date the First Division Company held and owned the main line from St. Anthony to Breckinridge, and the branch line from St. Paul, via St. Anthony, to Watab; and the St. Paul Company owned the St. Vincent and Brainerd Extensions, subject to the extension mortgage of $15,000,000, the construction contract, and the lease to the First Division Company for 99 years. (Rec. p. 53.)

The First Division Company, under its construction contract, had then completed only 139 miles of the extensions, viz.: from St. Cloud westward, 35 miles; from the intersection with the Northern Pacific Railroad near Glyndon, southward, 12 miles, and northward, 92 miles; all on the St. Vincent Extension; leaving unfinished about 230 miles, the grading of which was four fifths completed, bridges framed and ties made. (Rec. p. 62.)

The Kennedy bill alleged that the St. Paul Company had

no property except the franchise to build the Extension Lines, and earn the land grant of 10 sections per mile, in all about 2,368,000 acres of land; that the security of the extension mortgage bondholders depended entirely on such construction, which must be completed by Dec. 3, 1873; that the extension bonds were issued solely for the purpose of raising money to complete said extensions, and were negotiated on the faith of the proceeds being so applied.

That $10,700,000 of the extension bonds had been sold, and were outstanding in the hands of *bona fide* holders, and the First Division Company had received the proceeds, about $8,900,000. (Rec. p. 59.)

That various defaults had been made in the conditions of the $15,000,000 mortgage, *inter alia*, that said companies had neglected, refused and were unable to construct the extensions as they had contracted, and had failed to so apply the net proceeds of the bonds, but had wrongfully and in fraud of the bondholders, diverted the greater part to other purposes, a detailed statement of such breaches of covenant and fraudulent diversion of proceeds being set forth. (Rec. p. 65.)

That said St. Paul Company and First Division Company were without means or credit to complete said lines; their whole property would not suffice to pay their debts, and the shares of the capital stock of said two companies were of no tacual value as property, and the whole estate and franchises of said companies constituted a trust fund for the benefit of the bondholders alone, and in equity should be managed and administered for their exclusive benefit. (Rec. p. 66.)

That but little time was then left for completing said extensions and securing said land grant; and unless the court should take charge of the trust property and cause measures to be promptly taken to preserve and secure the land grant, the bondholders would suffer irreparable loss to the amount of millions of dollars.

That most of the bondholders resided in Europe, and took the bonds mainly on the security of the land grant, and the road, when completed. (Rec. p. 66.)

That if the court should appoint a receiver to take pos-

session of the mortgaged property, with authority to procure advances to complete the extensions upon receipts or vouchers which would give a preferred lien to the lenders, the plaintiffs and other bondholders and other men would provide the funds for that purpose; that the amount required was about $5,000,000, and it was impossible to provide it by other means than such receipts and vouchers.

The prayer was for an accounting concerning the extension bonds and their proceeds; that the court, through its receiver, take charge of and preserve the trust property, for the benefit of the bondholders, and secure the title to said land grant; that said trust funds and property, or so much as should be necessary, be sold to pay the cost of constructing said extensions, and that after the same should be completed, and the title to said lands secured, said extension mortgage should be foreclosed, etc. (Rec. p. 67.)

On this bill, on August 1, 1873, complainant, Farley, was appointed receiver of the property of the St. Paul Company, being merely the franchise to build the St. Vincent and Brainerd extensions. The only lines he could operate were the 139 miles then completed.

Prior to October 9, 1876, George L. Becker was removed as trustee, George T. M. Davis resigned, and John S. Kennedy was appointed trustee in his place, under the $2,800,000 mortgage; Samuel J. Tilden resigned, and John S. Kennedy was appointed trustee in his place under the $3,000,000 mortgage; George L. Becker was removed, and Samuel J. Tilden resigned, and John S. Kennedy was appointed trustee in his place under said $6,000,000 mortgage.

On October 9, 1876, Rice, Thompson and Kennedy, as trustees in the $1,200,000 and $3,000,000 mortgages, and Thompson and Kennedy as trustees in the $2,800,000 and $6,000,000 mortgages, respectively, took possession of said lines of railroad and property, except the land grants, under powers contained in the mortgages.

From that time until said lines, etc., were sold under foreclosure decrees and turned over to the purchasers, the trustees held and operated the Main and Branch Lines of the

First Division Company, and complainant was general manager for the trustees; and complainant continued to be receiver of the Extension Lines covered by said $15,000,000 mortgage, and managed and operated the same, or such parts thereof as were from time to time constructed and fit for operation, until the same were sold under foreclosure decrees and turned over to the defendant, the St. Paul, Minneapolis & Manitoba Railway Company. (Rec. pp. 31, 32.)

The railroad lines and affairs of these companies remained in substantially the condition shown by the Kennedy bill, from 1873 down to 1878. The main and branch lines of the First Division Company were in the possession of the trustees in the mortgages, after 1876, and the extension lines in the possession of the court, complainant being receiver. The extension lines were not completed, and the unearned land grants were in danger of forfeiture. The mortgage bonds were outstanding, face value and overdue interest, about $30,000,000. Most of the bonds were held and owned in Holland. No unity of action was being had or attempted by the bondholders, so far as the record discloses, to raise the funds needed to construct and equip the roads, or looking toward a plan of purchase and reorganization.

The trustees of the bondholders, who filed the Kennedy bill, on which complainant was appointed receiver, for the purpose of completing the extension lines, and securing the land grant on which the security of the bondholders mainly depended, had averred that if the court would appoint a receiver to take possession of the property, with authority to procure advances to complete the extensions, upon receipts or vouchers which would give a preferred lien to the lenders, the plaintiffs and other bondholders, and other men, would provide the sum required for such completion, which was alleged to be about $5,000,000. (Rec. p. 66.)

The Circuit Court, however, refused to issue debentures as a means of credit in advance of actual construction, or to allow the receiver to incur any indebtedness beyond moneys

actually advanced (Rec. p. 48), and this means of raising the necessary funds could not be adopted.

The bondholders in Holland, seeing that the roads were not completed, that a vast sum of money was required for that purpose, and that in default the land grants would be forfeited and their main security destroyed, preferred to sell their bonds, and they were offered in the market at a large discount. (Rec. p. 19.)

In the meantime five suits were pending in courts in the State of Minnesota to foreclose the several mortgages securing the bonds; and this railroad system was rapidly approaching foreclosure sales, with no concerted plan looking to the purchase of the roads in behalf of the bondholders, or a re-organization in their interest. The property was in danger of being sacrificed, and with it the interests of the bondholders. The roads were liable to be cut up, and portions bought at a nominal figure by rival lines. The value of the property depended largely upon these railroads being kept together as one system and operated as an entirety.

Above all, the fundamental necessity existed of completing the extension lines, to save the land grant and insure the future of the property.

At this point in affairs, in the summer of 1876, the parties to this suit, and others, viz.: George Stephens, Donald A. Smith, Norman W. Kittson, James J. Hill and complainant, entered into negotiations looking to concert of action and a consolidation of interests. They planned to raise the funds required and finish the extension lines, and entered into an agreement to buy the bonds at their market value from such of the bondholders as desired to sell, with a view to using them in payment for the property when sold under foreclosure decrees.

In 1877 negotiations were commenced, continuing to June, 1879, and resulting in the purchase of over $25,000,000 of bonds, face value and over due interest. The negotiations for the purchase were mainly conducted through John S. Kennedy, the representative in New York of the Dutch bondholders, and through their committee at Amsterdam, Hol-

land. Most of the bonds were bought under a written agreement with the holders that payment should not be made until the lines should have been purchased at the foreclosure sales, a new company organized, and new bonds issued, secured by mortgage on the same property, whereupon it was optional with the sellers to take the new bonds, or to be paid in cash at the agreed price. The bonds when purchased were placed in the hands of Kennedy & Barnes, of New York, as trustees, to be held until paid for as contracted, and were only delivered on such payment. (Rec. p. 20, 21.)

On May 31, 1878, the Circuit Court entered an order reciting that whereas George Stephen, Donald A. Smith, Norman W. Kittson and James J. Hill, are the equitable owners of $11,400,000 of the extension bonds as shown and set forth in an agreement dated March 13, 1878, between them and the committee (named) of the Dutch bondholders, and propose to advance the sum necessary to complete and equip the extension lines to St. Vincent, and from Melrose at least to Fergus Falls, as required by act of the legislature of Minnesota, of March 9, 1878, in time to save the forfeiture therein provided, and to secure the land grant to the company, if the court will authorize the receiver to construct and equip said extension lines on such terms and on the security of such liens as will be equitable to them, and as between them and other bondholders, and all others concerned; and it appearing that no foreclosure of said mortgage can be had in time to prevent the forfeitures provided for in said act, and that if said forfeitures are made the security of said mortgage will be, as to the unfinished lines, wholly destroyed; and the court having refused to issue debentures as a means of credit in advance of actual construction, or to allow the receiver to incur any indebtedness beyond the money actually advanced; the court therefore authorized the receiver, out of moneys so to be furnished, and not otherwise, to construct and equip said extension lines at a cost not to exceed $10,000 per mile, and provided when said extension lines were fully com-

pleted in such manner as to secure the land grant, etc., the receiver would be authorized to issue debentures in such form as the court should then direct, for the actual sums so advanced, to be a first lien on all lines of road so completed and on the lands thereby earned, but not on lines already completed or lands already earned; and providing further, that any bondholder under said $15,000,000 mortgage might at any time before the issue of debentures or before foreclosure sales, pay his *pro rata* share of the necessary cost of the construction and equipment of the road under this order, and on placing himself in this regard on the same footing as Smith, Stephen, Kittson and Hill, should be entitled to equal rights with them in respect of said debentures and the lien thereof. (Rec. p. 48.)

Under this order the money required, several millions of dollars, was advanced and applied to the completion of the extension lines, and thereby the forfeiture of the land grant was prevented, and a large amount of valuable property saved to the bondholders under the mortgage.

In March and April, 1879, foreclosure decrees were entered in the several suits pending, which decrees provided that in payment for the mortgaged property said bonds and overdue coupons should be taken as cash for such an amount as would equal the dividend to which they would be finally entitled, *pro rata*, under the decrees; and in May and June, 1879, said railroad lines, etc., were sold at public auction under and pursuant to said decrees, and were bid in by and turned over to the defendant, the St. Paul, Minneapolis and Manitoba Railway Company, which had been organized by Smith, Stephens, Kittson and Hill for that purpose, for the use and benefit of all the parties interested in said bonds, including complainant. (Rec. p. 22.)

The defendants, Kittson, Hill and the Manitoba Railway Company, having come into the possession of the proceeds and profits of this undertaking, including a large amount of stock of said company and other property, and having refused to account with complainant or to deliver to him his share of said profits and proceeds, on Nov. 13, 1880, he

filed his bill in the court below, and on Dec. 15, 1880, filed his amended bill, in substance, as follows: (Rec. pp. 18, 26.)

AMENDED BILL OF COMPLAINT.

Alleges in substance: (Rec. pp. 18, 26.)

1. That in 1876 complainant, and defendants Kittson and Hill, agreed jointly to purchase all the bonds possible to be obtained of said St. Paul Co. and of said First Division Co., said bonds being for sale at a large discount, mortgages securing them being in process of foreclosure in five suits in courts in the State of Minnesota. The object was to use the bonds in purchasing the lines of road, etc., when sold under foreclosure decrees.

It was further agreed that Kittson should procure the necessary funds from Donald A. Smith and other capitalists in Canada, giving such persons a one half interest in the enterprise; the remaining interest to be for the joint benefit of complainant, Kittson and Hill. The procuring the funds and purchasing the bonds were to be conducted by Kittson, Hill *et al.*, and complainant was to furnish facts, information, advice and assistance as required.

That complainant had knowledge not possessed by the others as to the whereabouts and situation of the bonds, their rated value by the holders, the mode whereby they could be reached and procured, the situation, amount, character and value of the lines of railroad and other property, and in respect to the pending foreclosure suits; and his services and co-operation were indispensable to the success of the enterprise.

2. That Kittson procured Donald A. Smith and George Stevens to furnish the funds necessary to purchase or secure control of the bonds, and agreed to give them a one half interest, the balance belonging to complainant, Kittson & Hill, equally, under their agreement.

3. In 1877 negotiations were commenced by Smith, Stevens, Kittson & Hill and complainant, continuing to

June, 1879, resulting in the purchase and securing of over $25,000,000 of said bonds, face value and over due interest. The purchases were made in the name of Smith, Stevens, Kittson & Hill, pursuant to the agreement. Throughout said negotiations and purchase complainant was continually called upon by Kittson & Hill, and at their request furnished facts, information, advice and co-operation, without which such negotiations and purchase would not have been successful. Most of the bonds were purchased under agreement with the holders, that payment should not be made until the railroad lines and other mortgaged property should be sold under foreclosure decrees, and acquired by the purchasers, and a new issue of bonds made, secured by a new mortgage on the same property, whereupon it was optional with the seller of the bonds to be paid at the agreed price, or to take the new bonds of the new company.

It was the understanding of all parties that as soon as the lines of railroad, etc., should be acquired under the foreclosure sales, a new issue of bonds should be made by them, or by the new company to be organized to take and operate said property, secured by a new mortgage of sufficient amount to defray the cost of the bonds purchased, and all other expenses of said enterprise.

[Added by amendment.] That nearly all of said bonds were held and owned in Holland, Europe; and John S. Kennedy, of New York, was the agent and attorney in the United States of a large majority of the owners of each class and issue of said bonds, with full power and authority to act in respect thereto, as in his judgment might seem best; that he was also trustee in all of said mortgages, (excepting the one for $15,000,000 on the Extension Line), and was agent for, and held and represented over $11,000,000 of the bonds secured by the $15,000,000 mortgage; that he was plaintiff in all of said suits, except the suit to foreclose the $15,000,000 mortgage; that all of said suits were caused to be commenced by him, and were prosecuted under his control and direction as such agent and trustee, and complainant was appointed receiver of the property of the St. Paul

and Pacific R. R. Co., and was made general manager of the lines of road of the First Division of the St. Paul and Pacific R. R. Co., under the trustees in said mortgages in possession thereof, upon the recommendation and request of said Kennedy.

That after said agreement between complainant, Kittson & Hill, and before decrees of foreclosure in said suits, and while negotiations were pending for the purchase of said bonds, complainant informed Kennedy of his interest and connection with Kittson & Hill in said purchase, and Kennedy had full notice and knowledge thereof, and fully approved and sanctioned the same; that said negotiations were mainly had with and conducted by Kennedy on behalf of the bondholders, as their agent, and the bonds, when purchased, were placed in the hands of Kennedy and his partner, John S. Barnes, as trustees, to be held until paid for as contracted, and were only delivered on such payment; that Kennedy strongly recommended the bondholders to sell their bonds on the terms offered by Smith, Stevens, Kittson & Hill, as the best disposition that could be made of them, and that very few of said bonds were purchased, except through said negotiations with Kennedy.

That to all inquiries made by Kennedy, or any of the trustees in said mortgages, or by any of the bondholders, or by any one interested in said property, complainant always gave full and true answers and information to the best of his knowledge and ability, and kept Kennedy fully informed of all facts and matters affecting said property, and in all things acted honestly and in good faith toward all persons interested in the property under his control as manager or receiver.

That the suit in which complainant was appointed receiver of the property of the St. Paul & Pacific R. R. Co., was not a suit to foreclose any mortgage, but was commenced by Kennedy and others simply to have a receiver appointed of said property, for its preservation, and the completion of certain unfinished sections of said line of road. [End of amendment.]

4. The defendant, the St. Paul, Minneapolis and Manitoba Railway Co., is a corporation organized in May, 1879, by Smith, Stevens, Kittson and Hill, for the purpose of acquiring and operating said lines of railroad and mortgaged property, for the use and benefit of the parties interested in the purchase of the bonds, and Smith, Stevens, Kittson and Hill are officers and directors of said company, and have the control and management thereof,

5. That in March and April, 1879, foreclosure decrees were entered directing the sale at auction of said railroad property, and providing that the mortgage bonds and overdue coupons should be taken in payment as cash for such an amount as would equal the dividend to which they would be entitled, *pro rata*, under the decrees; and in May and June, 1879, the lines of railroad and other mortgaged property were bid in and purchased at said foreclosure sale by the St. Paul, Minneapolis & Manitoba Railway Co., for the use and benefit of the parties interested in the purchase of said bonds, including complainant, by the direction and procurement of Kittson, Hill, Smith and Stevens; that said bonds were used in payment for the property, and the railway company paid nothing, but took the same without consideration, except that furnished by complainant, Kittson, Hill, Smith and Stevens. Thereby over 500 miles of railroad, with equipments, and over 1,000,000 acres of land and other valuable property, worth in all over $15,000,000, were acquired by said railway company for the use and benefit of complainant, Kittson, Hill, Smith and Stevens, in proportion to their respective interests, subject only to the advances made and expenses and obligations incurred in carrying out said enterprise. And Smith and Stevens then and there had notice and knowledge that complainant was jointly and equally interested with Kittson and Hill in the bonds so purchased and in said undertaking.

6. That on June 21, 1879, said defendant railway company, by direction of Smith, Stevens, Kittson and Hill, issued and negotiated its bonds for $8,000,000, payable in 1909, secured by mortgage on the lines of railroad, land,

etc., of the company, and said new bonds and proceeds were used, so far as necessary, to pay the cost of the bonds purchased and all other expenses of said enterprise, and were more than sufficient therefor.

7. That since June 15, 1879, the defendant company, under the control of Smith, Stevens, Kittson and Hill, has been in posssesion of, and operated said railroads, and has received from earnings, above expenses and interest on bonds, over $500,000, and has received large sums from the sale of lands, and has made expenditures, the amount of which complainant is unable to state.

8. The stock of said defendant railway company, $15,000,000, divided into shares of $100 each, which are worth par, represents the property so acquired, and constitutes, in part, the profits of said enterprise: but in addition, other profits of many hundred thousand dollars have been realized from said enterprise, and divided between Smith, Stevens, Kittson & Hill; and a large amount of said capital stock has been issued and divided between them, viz.: 57,646 shares—to Kittson ½ thereof, and to Hill ½ thereof, being a portion of that to which they and complainant were entitled under said agreement.

9. That Kittson & Hill never denied, but always admitted and recognized the right of complainant under said agreement to an equal share with them in the profits of said enterprise, until after the organization of said new company.

But defendants now pretend complainant has no interest in said enterprise or its results, and refuse to turn over to him any of said stock, or to account to him for any of said profits, and claim, to the exclusion of complainant, all the profits to which Smith & Stevens are not entitled; and said railway company, conspiring with them to cheat and defraud complainant, refuses to account to him for his interest in said property or the profits, which have come to its possession, or to issue to him any of said capital stock.

Prayer that Kittson & Hill discover the terms of their agreement with Smith & Stevens; the amount and cost of bonds purchased; amount of expenses, and of money

actually furnished by them, and by Smith & Stevens; when and for what purpose paid out, and from what source repaid; what dividends or profits in money, bonds, stock, etc., have been received by, or turned over to them by said company, and for what consideration; what property is now held by said company, and what lands have been sold by it; when and for what consideration; and what use has been made of the bonds and proceeds thereof, issued by said company; that an account may be taken, and Kittson & Hill be decreed to pay over to complainant one third of all moneys, bonds, stock, etc., found to have been received by them. That complainant be decreed entitled to an equal interest with Kittson & Hill in said undertaking and profits; that the railway company be decreed to issue to complainant his just proportion of its capital stock, and to account to him for his share of the property and profits in its possession, to recognize his rights in said stock and profits as equal with Kittson & Hill, and for general relief.

THE PLEA OF DEFENDANTS.

Plea of defendants, Kittson & Hill, to the whole of the amended bill, filed Feb'y 16, 1882, in which the defendant railway company joined, after its demurrer to the bill had been overruled (Rec., p. 35); after reciting the several issues of mortgage bonds by the St. Paul Company and the First Division Company, the filing of the Kennedy bill in 1873, the appointment of complainant as receiver of the extension lines, the resignation and removal of certain trustees, the appointment of John S. Kennedy in their place, and the taking possession by Rice, Thompson & Kennedy, as trustees, Oct. 9, 1876, of the main and branch line of the First Division Company, alleges in substance that:

From that time until said lines, etc., were sold under foreclosure decrees and turned over to the purchasers, said trustees held and operated the same, and complainant was general manager of said lines for the trustees; and complainant continued to be receiver of the lines of the St. Paul

Company covered by said $15,000,000 mortgage, and managed and operated the same, or such parts thereof as were from time to time constructed and fit for operation, until the same were sold under foreclosure decrees and turned over to the defendant, the St. Paul, Minneapolis and Manitoba Railway Company; and complainant has not yet been discharged as receiver nor settled his final accounts as such.

That complainant never informed Kennedy or any of the bondholders, of his interest in the project of purchasing said bonds and acquiring the mortgaged property, nor did Kennedy or any of the bondholders know or suspect, or have any information or belief, at any time until after confirmation of the foreclosure sales, that complainant claimed such interest.

That as receiver of the lines of the St. Paul Company, covered by said $15,000,000 mortgage, complainant could not lawfully make said agreement or engage in the enterprise of purchasing said bonds, or the property covered by said mortgage; and his making such agreement and embarking in such enterprise was a breach of trust and fraud on the bondholders of said $15,000,000 issue, and on this court.

That as general manager for the trustees in said mortgages of the lines of the First Division Company, complainant occupied a trust position toward his employers, said trustees and the bondholders, and by making said agreement and engaging in said enterprise, was guilty of a breach of trust and fraud upon the trustees and bondholders.

That by reason of said fiduciary positions occupied by complainant, he is not entitled in equity to any relief. (Rec. pp. 29–33.)

REPLICATION AND STIPULATION.

The replication of complainant was filed March 6, 1882 (Rec., p. 33), and on July 3, 1882, it was stipulated by counsel for complainant and defendants, for the purposes of the

hearing on the plea, that all the averments of the plea, down to and including the words: "and has not yet settled his final accounts as such," are true as therein stated; and that the original and supplemental bills in the suit of *John S. Kennedy et al.* v. *The St. Paul & Pacific R. R. Co. et al.*, and the order of this court dismissing said supplemental bill, be deemed to be and are in evidence, and control the averments of the bill and plea in respect to the purpose of said suit. (Rec., p. 52.)

THE ISSUE OF FACT.

On the pleadings and under this stipulation, the only issue of fact was, whether complainant ever informed John S. Kennedy or any of the bondholders, of his interest in the project of purchasing the bonds and thereby acquiring the mortgaged property; and whether Kennedy or any of the bondholders ever knew, suspected, were informed or believed, at any time until after confirmation of the foreclosure sales, that complainant claimed such interest. The lack of such information, knowledge, suspicion and belief is affirmatively set up by the plea.

THE ISSUES OF LAW.

The only questions of law raised by the plea are that complainant could not lawfully make the agreement alleged in the bill.

(1) As to the lines and property of the St. Paul Company, covered by the $15,000,000 mortgage, because he had been appointed receiver, and as such had managed and operated said lines until the same were sold under foreclosure decrees to the St. Paul, Minneapolis & Manitoba Railway Company.

(2) As to the lines of the First Division Company covered by the other mortgages, because complainant had, as general manager for Kennedy, Rice & Thompson, trustees, managed and operated the lines of railroad, which the trustees had taken possession of under powers contained in said mortgages.

THE PROOFS.

The only evidence introduced by either side upon the issue of fact raised by the plea, was the testimony of complainant, taken by stipulation March 15, 1882 (Rec. pp. 40–47); the order entered by Judge Dillon, May 31, 1878, authorizing the receiver to finish the extension lines with money to be furnished by Smith, Stevens, Kittson and Hill (Rec. pp. 47–50); the bill of complaint and exhibits filed July 14, 1873, by *John S. Kennedy et al.* v. *The Northern Pacific R. R. Co., The St. Paul Co., The First Division Co. et al.* (Rec. pp. 52-98); the supplemental bill filed in said cause August 2, 1875 (Rec. p. 98); and the order entered Dec. 18, 1875, dismissing said supplemental bill by consent of parties, without prejudice (Rec. p. 99); all of said proceedings being in the Circuit Court of the United States for the District of Minnesota.

THE DECREE ENTERED JULY 15, 1882,

Recites: This cause having been heard upon the bill of complaint, pleas, replications and proofs, it is ordered, adjudged and decreed, that the pleas of the defendants to the plaintiff's bill of complaint herein be, and the same are hereby sustained; and that said bill of complaint be, and the same is hereby dismissed out of court, and that defendants recover of the plaintiff their costs, to be taxed, and that execution issue therefor. (Rec. pp. 35, 36.)

## ASSIGNMENT OF ERRORS.

The appellant says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1. The court below erred in sustaining the pleas of the said defendants to the amended bill of complaint of the said complainant.

2. The court below erred in dismissing the bill and amended bill of complaint of the said complainant.

3. The court below erred in entering its said decree of July 15, A. D. 1882, in substance, manner and form as aforesaid.

## ARGUMENT.

### I.

THE PLAN OF PURCHASING THESE BONDS, AND USING THEM IN PAYMENT FOR THE RAILROADS AND MORTGAGED PROPERTY, AT THE FORECLOSURE SALES, WAS IN NO SENSE FRAUDULENT.

No one could thereby be defrauded who had not some pecuniary interest in the mortgaged property. Who were or could be so interested? Manifestly only (1) floating, unsecured, or judgment creditors; (2) the stockholders; (3) the bondholders.

1. There is no evidence in the record of any unsatisfied, unsecured creditors. It is the usual practice in the United States courts, upon the foreclosure of railroad property, to make provision for the payment of debts due contractors, material men, employes, etc., accrued within a reasonable period, before confirmation of the sales: *Fosdick* v. *Schall*, 99 U. S. Rep. 235; *Sage* v. *Central R. R Co.*, Id. 341; *Burnham* v. *Bowen*, 111 U. S. Rep. 780; *Union T. Co.* v. *Souter*, 107 U. S. Rep. 591; *Miltenberger* v. *Logansport Ry. Co.*, 106 Id. 286.

The order of the Circuit Court, entered May 31, 1878, required Smith, Stephen, Kittson & Hill to execute and file in the cause an instrument securing the claims of contractors and laborers, under the receiver, in completing the extension lines. (Rec. p. 49). The foreclosure decrees were not entered until March and April, 1879, and the roads, etc., were not sold until May and June, 1879.

In the absence of any complaint by such creditors, or of any allegation or proof on the subject, the court will not presume that such creditors existed, and that they were defrauded.

2. The record shows that the pecuniary interests of the stockholders were practically extinguished long before the inception of this undertaking.

The sworn bill in the Kennedy suit, filed July 14, 1873, which is in evidence herein by stipulation, alleges:

"That the shares of said First Division Company, and of the St. Paul Company, to the full amount of the capital thereof, were falsely and fraudulently issued as full paid stock, without any payment therefor to the company, and were so issued to some person or persons unknown to the plaintiffs, by which person or persons the same were transferred to said Northern Pacific Railroad Company, which received and held the same with notice of said fraudulent issue, and paid such person or persons therefor a sum far less than the nominal amount thereof." (Rec. p. 66).

"That said St. Paul Company and said First Division Company are wholly without the means or credit to procure the completion of their lines of railroad, and the whole property of said companies will not suffice to pay their debts, and the shares of the capital stock of said two companies are therefore of no actual value as property, and the whole of the estates and franchises of said two companies, constitute in effect a trust fund for the benefit of the bondholders alone, and in equity ought to be managed and administered for the exclusive benefit and protection of the bondholders." (Rec. p. 66).

These averments are not contradicted. The total amount of bonds outstanding, face and over-due interest, at the time of the foreclosure sales was over $25,000,000. This exceeded the value of the railroads and property mortgaged.

The equity of the stockholders was subject to the lien of the mortgage bonds. The only way they could secure anything out of the property, was either to pay off or buy the bonds, or to bid in cash at the foreclosure sales, an amount equal to the face and interest due on the bonds. They had the same opportunity to buy the bonds as the parties to this suit. They failed to do so and voluntarily allowed their interests, if any they still had, to be cut off by the foreclos-

ures. In the absence of any effort to redeem, or any complaint on their part, without allegation or proof in the record, this Court will not presume the stockholders were injured or defrauded.

3. No fraud was perpetrated on the bondholders in the purchase of these bonds.

(1) It is true the bonds were depreciated in value, but this was not the result of any act of complainant or his associates. There is neither allegation or proof that complainant did anything to lessen the value of the mortgaged property or the bonds, nor that any less than their real value was paid for them.

The amended bill alleges that most of the bonds were purchased under an agreement with the holders, whereby payment was not to be made until decrees of foreclosure of the mortgages should be rendered, and the lines of railroad and other property sold under such decrees, and acquired by the purchasers, and a new issue of bonds made, secured by a new mortgage on the same property, whereupon it was optional with the seller of the bonds to demand cash at the agreed purchase price, or to take the new bonds of the newly to be organized company. (Rec. p. 20.)

This averment is not controverted by the plea. It therefore appears that the whole plan for the purchase of the bonds, their use in payment for the railroads, etc., at the foreclosure sales, the organization of a new company and the issue of new bonds secured by a new mortgage on the same property, was known and agreed to by the holders at the time the bonds were purchased. No bondholder has ever complained that this was a fraud upon him, or that he did not receive the full value of his bonds.

Most of the bondholders resided in Holland; John S. Kennedy, of New York, was their agent and representative in the United States. (Rec. p. 21.) The negotiations which resulted in the purchase were mainly had with, and conducted by Kennedy, in behalf of the bondholders, and the bonds, when purchased, were deposited with Kennedy and Barnes as trustees, named in the agreement, to be held until

paid for pursuant to the agreement, and were only delivered on such payment. And Kennedy, as such agent, strongly recommended the bondholders to sell their bonds on the terms offered, as the best disposition that could be made of them. (Rec. p. 21.)

Not only was the sale of the bonds approved and recommended by Kennedy, but the first negotiations for their purchase were commenced with John Carp, a member of the Dutch committee, whose name appears in the order of the Circuit Court, entered May 31, 1878, as one of the signers of the agreement under which the bonds were purchased. Complainant testified on cross-examination that negotiations had been going on between Smith, Stevens, Kittson & Hill, and the Dutch committee, for the purchase of the bonds represented by the committee, for about a year prior to February 22, 1878. In these negotiations Kennedy & Co. did not take a very active part for a long time. The first negotiation was commenced with John Carp, in St. Paul, about February, 1877. Complainant introduced Kittson and Hill to Carp, at his room, where the purchase of the bonds was first broached. (Rec. p. 43.)

Thus it appears that when the negotiations for the purchase commenced, Mr. Carp, a member of the Dutch committee, was in St. Paul, on the ground where the condition and prospects of the roads and the actual value of the bonds could best be ascertained.

The bonds were bought openly and publicly. There was no concealment. Mr. Kennedy, in his letter of February 25, 1878, to complainant, says:

"The purchase has now been concluded, we have so advised the committee at Amsterdam, and it will be publicly announced there to-morrow morning." (Rec. p. 41.)

The agreement for the purchase of the bonds was known to and sanctioned by the court. It was talked over with Judge Dillon at the time the order of May 31, 1878, was entered, and at previous hearings before him at DesMoines. (Rec. p. 45.)

The order entered May 31, 1878, authorizing the con-

struction of said extension lines and the issuing of debentures to pay the cost thereof, recites: (Rec. p. 47.)

"This cause having come on to be heard on the 18th day of April, A. D. 1878, at Jefferson City, in the State of Missouri, on the application of J. P. Farley, Esq., receiver of the defendant, the St. Paul & Pacific R. R. Co., to be authorized to issue the debentures of said company for the purpose of constructing the uncompleted portions of said railroad, and to sell lands pertaining to the completed portions thereof; and the court, for the purpose of fully advising itself in the premises, having then appointed a commission of examination, to report all the facts necessary to enable the court to judge of such application; and said commission having so reported, and the court being fully advised in the premises, it is hereby ordered: That the order heretofore made in this cause on the first day of August, A. D. 1873, appointing a receiver for said company and authorizing him, among other things, to issue certain debentures, as modified by an order made herein on the first day of September, A. D. 1873, be further modified and supplemented as follows:

"I. Said receiver shall issue no debentures, in addition to those already issued, except as hereinafter provided, and only when specially ordered by the court to do so; but those already issued shall continue to have the liens and preferences heretofore secured to them by the orders of this court."

"II. Whereas, George Stephen, Donald A. Smith, Norman W. Kittson and James J. Hill, represent and show to the court that they are the equitable owners of $11,400,000 of the $15,000,000 issue of bonds secured by the extension mortgage of April 1, 1871, as shown and set forth in an agreement between them, as parties of the first part, and Chemet & Weetjen, Kirkhoven & Co., Lippman, Rosenthal & Co., Wurfbain & Son, Tutein, Nolthenvier & DeHann, H. C. Voorhoeve & Co. and John Carp, the committee of the Dutch bondholders of the St. Paul and Pacific Railroad Company, parties of the second part, being an agreement

of twenty-seven articles, dated March 13, 1878, and which said $11,400,000 of bonds are held by John S. Kennedy & Co., (the plaintiffs herein), as trustees, as shown in said agreement; and,

"Whereas, the said Stephen, Smith, Kittson & Hill, propose to advance and furnish, or cause to be advanced and furnished, the full sum necessary to complete and equip the said extension lines to St. Vincent, and from Melrose at least to Fergus Falls, as required by the act of the legislature of the State of Minnesota, approved March 9, 1878, in time to save the forfeiture therein provided for, and to secure the land grant to the company, if the court will, in this cause, authorize the receiver to construct and equip the said extension lines," etc., etc.

"III. Any bondholder under the $15,000,000 mortgage aforesaid, is hereby accorded the right at any time before the issue of debentures, and if the court shall think just, at any time before the sale of the property under the decree of foreclosure, to pay his *pro rata* share of the necessary cost of the construction and equipment of the road under this order, and on placing himself in this regard upon the same footing as the said Stephen, Smith, Kittson and Hill, shall be entitled to have equal rights with them in respect of said debentures and the lien thereof; and power to make provisions in detail to secure this right is hereby reserved."

"V. The said Stephen, Smith, Kittson and Hill, shall jointly and severally execute an instrument approving of this order, * * * * and agreeing to procure, within sixty days, the formal and duly authenticated assent of the said Dutch committee to this order, and the said instrument shall be filed in this cause."

"VII. Before this order shall take effect there shall be filed in this court the duly authenticated assent to its provisions, of the new trustees of said $15,000,000 mortgage, and of John S. Kennedy and John S. Barnes, the trustees named in said agreement between said Stephen, Smith, Kittson and Hill, and said Dutch committee, and the approval in writing

of the terms hereof by Messrs. John B. Henderson and T. C. Reynolds, the commission appointed by said order of April 18, 1878."

"VIII. And it is further ordered that said Kennedy and Barnes, the plaintiffs herein and trustees as aforesaid, shall not part with the possession of said $11,400,000 of bonds, or any of them, without the special order of the court, and that a copy of this order be served on the Mercantile Safe Deposit Company in the city of New York, and proof of service by some disinterested person shall be filed in this cause."

(2) There was nothing fraudulent in using the bonds so purchased, in payment for the railroad lines, etc., at the foreclosure sales.

The only value of the bonds, aside from the price at which they could be sold in the market, was their value as a means of acquiring the mortgaged property. This was a legitimate use of the bonds, and was expressly provided for in the extension mortgage and in the foreclosure decrees.

By article seventh of the extension mortgage the bonds were receivable at par, including accrued interest, in payment for any section, division or parcel of said lands, dollar for dollar, of principal or accrued interest to the same nominal amount. (Rec., p. 80.)

Article fourth of the same mortgage, provided:

"At any public sale of the said railroads and property, or any part thereof, whether made by virtue of the powers hereinbefore granted, or by judicial authority, the trustees hereunder, for the time then being, may bid for and purchase, or cause to be bid for and purchased, the property so sold, or any part thereof, in behalf of all the holders of bonds secured by this instrument and then outstanding, in the proportion of the respective interests of such bondholders, at a reasonable price, if but a portion of said property shall be sold; and if the entire railroad and property shall be sold, then at a price not exceeding the whole amount

of said bonds then outstanding, with the interest accrued thereon and the expenses of such sale." (Rec., p. 78.)

The foreclosure decrees entered in March and April, 1879 expressly provided that "in payment for the mortgaged property so ordered to be sold, the said mortgage bonds and overdue coupons should be taken as cash for such an amount as would equal the dividend to which they would be finally entitled, *pro rata*, under the decrees." The roads were sold under and pursuant to these decrees, the sales were confirmed by the court, and the property turned over to the purchasers. (Rec., pp. 23, 32.)

The record further shows that the $15,000,000 of extension bonds would have been rendered practically worthless unless some one could be induced to advance the large sum of money needed to complete the extension lines and thus secure the land grants on which their security depended. (Rec. p. 48.)

The property conveyed by the extension mortgage, and the only property the St. Paul Company then had, was "All and singular that certain branch line of railroad of the said party of the first part, or which the said party of the first part is by law authorized to construct, and which is to be constructed and to run from some point at or near the town of St. Cloud, in the county of Stearns, to the town of St. Vincent, in the county of Pembina and State of Minnesota, being a distance of 293 miles, more or less; and also all and singular that certain other line of railroad of the said party of the first part, or which the said party of the first part is authorized by law to construct, and which is to be constructed, and to run from Watab, in the county of Benton, by way of Crow Wing, to Brainerd, in the county of Crow Wing, to intersect with the Northern Pacific Railroad, being a distance of 55 miles, more or less, as contemplated by the said act of Congress, approved March 3, 1871, together with the equipments and appurtenances of the said railroads, respectively, and the rights, privileges and franchises thereunto belonging and appertaining, or which shall or may at any time hereafter thereunto belong or ap-

pertain," and also all right, title and interest which said first party now has or may hereafter acquire in and to the lands granted by Congress as aforesaid, to aid in the construction of said extension lines, and all improvements, equipments and rolling stock appertaining to said extension lines. (Rec. p. 74.)

There is no evidence that the stockholders, the bondholders, or any other person interested in the property, stood ready to advance the large amount of money already shown to be required to complete the extension lines; and yet without it the roads would not have been completed, the land grant would have been forfeited, and the main security of the bondholders destroyed. The parties engaged in this undertaking with complainant would have had no interest leading them to advance several millions of dollars to complete these lines, if they had not already been, as the order of Judge Dillon recites, "the equitable owners of $11,400,000 of the $15,000,000 of bonds secured by the extension mortgage."

There was no other plan of purchase and re-organization by or on behalf of the bondholders which was forestalled or prevented by the complainant or his associates. For five years—from 1873 to 1878—notwithstanding they had ample opportunity, the bondholders had not combined, either to furnish the money necessary to complete the extension lines, or to purchase the property on foreclosure as provided in the extension mortgage. At the end of that time they chose to sell the bonds to the men who were willing to advance and risk the sum necessary to carry out this great undertaking. The bondholders had a perfect right to so dispose of their bonds, instead of embarking in a speculation which required the raising of a vast capital, and might have proved disastrous. And, in the absence of actual fraud or deception practiced by them, the purchasers had a clear right to the bonds, and an equal right to use the bonds to bid in the property in accordance with the terms of the mortgages, and the foreclosure decrees.

In *Sage* v. *Central Railroad Co.*, 99 U. S. R. 334, this Court,

in considering the clause in the mortgage providing for a foreclosure sale, and a purchase and re-organization in the interest of the bondholders, said:

"The purposes sought to be accomplished by it are manifest."

"*First.* It was designed for protection against the perils of a forced sale of an unsalable property for cash. It was well known that at judicial sales of railroads for cash, there is little likelihood of obtaining a bid for a sum at all commensurate with the value of the property sold, or with the amount of incumbrances upon it. The amount required is so large usually, that it is beyond the reach of ordinary purchasers. In such a case as the present, the first mortgage bondholders are the only party that can become the purchasers, and they only because they need not pay their bid in cash."

"*Secondly.* The agreement looked further. It provided for the contingency of a purchase by bondholders under the mortgage. But such a purchase could not inure equally to the benefit of all, unless all were parties to it. There is almost a certainty that in foreclosure sales of a railroad, especially when the mortgage debts exceed the market value of the property, as in this case, the purchaser will be an association of some of the bondholders secured by the mortgage, who buy with the intention of organizing a new company to hold the property for their interests."

In the case of *Williams* v. *Morgan*, 111 U. S. R. 684, the bondholders of the New Orleans, Mobile, and Chattanooga R. R. Co. appointed a purchasing committee, and made an agreement to deposit their bonds with the Central Trust Company of New York, to be used in purchasing the road at the foreclosure sale, and authorized the committee, in concert with the trustees and receivers, to make an arrangement with the Louisville & Nashville R. R. Co. to transfer the purchase of the road (when made by the committee) to a corporation to be organized in the interest of the latter company, and agreed that a new mortgage should be executed after the sale, securing bonds to the amount of $5,000,-

000, a part of which should be applied to the payment of the foreclosure debt, and a part to the payment of expenses. This agreement was recognized as valid by the court below, and referred to and recited in the foreclosure decree. Neither the court below nor this court considered there was anything illegal or fraudulent in this use of the bonds.

In the case of *Shaw* v. *Railroad Co.*, 100 U. S. R. 605, a similar plan of purchase and re-organization in behalf of the bondholders was adopted and incorporated in the decree below, and was approved on appeal to this court, which held, that the fact that two of the trustees in the mortgages, who appeared in court and consented to the decree, were also holders of bonds, secured by their respective trusts, and to that extent had an interest in the purchase, did not in any way invalidate the transaction in the absence of proof of actual wrong or fraud.

The fact, that in this enterprise a large profit was realized, as counsel for defendants say, of $15,000,000, is the only scintilla of evidence relied upon by them or the court below, as proof of actual fraud. If the enterprise had resulted in a loss, according to this view of the case, it would not have been fraudulent. Its character as a fraud, or not, depended entirely on its results as a speculation.

It required the investment of millions of dollars to buy the bonds, and millions more to build the extension lines. This involved a vast risk. Able financiers might well doubt the success of such an undertaking. Complainant testified on cross-examination: "The first negotiation commenced in St. Paul with a member of the committee named John Carp, I think, in February, 1877. Mr. Barnes, the partner of J. S. Kennedy, was in St. Paul at the time, but was very skeptical on the subject, and did not seem to want to have anything to do with it. Did not seem to think that Kittson & Hill could raise the money." (Rec. p. 43.)

And on direct examination:

"I had a conversation with Mr. Kennedy in his private office, 41 Cedar street, New York, about my being interested with Kittson & Hill in the purchase of the bonds referred

to. Mr. Kennedy made no objections, but rather seemed to be gratified. He thought it was a good thing for me, and only advised me to ascertain how much money it would be necessary for me to raise to carry out the project. To the best of my recollection, this was in the month of April, or very early in May, 1878." (Rec. p. 42.)

If the monetary depression which lasted for several years after 1873, had continued, there would doubtless have been a loss in this undertaking. The vast stream of immigration which flowed into the great northwest Territories of Minnesota, Dakota and Manitoba, in 1879–80, and which still continues, settling the waste places, increasing the value of the lands and the traffic of the roads, has made this undertaking a success. However that may be, the bare fact, that in consequence of a purchase, and the investment of millions of dollars, a profit of millions has been made, is not alone, of itself, an evidence of fraud.

There is nothing in the record to show that anything was done, or left undone, by complainant, or by Smith, Stevens, Kittson or Hill, by which the bonds, or the mortgaged property, were depreciated in value; or that any form of circumvention, deceit, lying or false representation was used as to the intrinsic, market or prospective value of the bonds or the railroad lines; or as to the prospects and probable future of the property; or as to the difficulty, time, expense or hazard of foreclosing the mortgages; nor does it appear that any fraudulent means were used to induce the bondholders to sell their bonds, or to sell them at less than their value, or in procuring the signatures to the option agreement under which the bonds were sold, or in obtaining the possession of the bonds without paying the agreed price, or without complying with the terms of the agreement. None of these acts, or any other acts or neglects which would evidence a fraudulent design, being averred or shown, it is impossible for us to comprehend upon what ground it could be said that there was actual fraud in this purchase.

If actual fraud is found in this record, it must be *presumed*, in the absence of either allegation or proof,—not only

as against the complainant, and against the defendants, as their counsel urge, but as against John S. Kennedy, the trustee, who knew and approved of complainant's interest in the purchase, and strongly recommended the bondholders to sell their bonds on the terms offered by Smith, Stephen, Kittson & Hill; and this without any apparent motive on his part to defraud his beneficiaries.

The learned court below found no difficulty in presuming fraud not only as against complainant, but also as against Kennedy,—as we submit, contrary to well established rules of law.

## II.

THE PLEA OF DEFENDANTS RAISES ONLY THE QUESTION OF CONSTRUCTIVE FRAUD, RESULTING FROM COMPLAINANT'S FIDUCIARY RELATION AS RECEIVER AND GENERAL MANAGER.

The averments of the plea, reciting the various issues of bonds, the filing of the Kennedy bill, the appointment of complainant as receiver of the extension lines, the substitution of John S. Kennedy as trustee in the mortgages *vice* Samuel J. Tilden and George T. M. Davis resigned, and George L. Becker removed, the taking possession of the main and branch lines by the trustees on Oct. 9, 1876, and their appointment of complainant as general manager under them, are admitted by the stipulation. (Rec. p. 52.)

The only remaining allegations of the plea are:

1. That complainant never informed Kennedy or any of the bondholders of his interest in the project of purchasing said bonds and acquiring the mortgaged property, nor did Kennedy or any of the bondholders know or suspect or have any information or belief at any time until after confirmation of the foreclosure sales, that complainant claimed such interest.

2. That as receiver of the lines of the St. Paul Company covered by said $15,000,000 mortgage, complainant could not lawfully make said agreement or engage in the enter-

prise of purchasing said bonds, or the property covered by said mortgage; and his making such agreement and embarking in such enterprise was a breach of trust and fraud on the bondholders of said $15,000,000 issue, and on this court.

3. That as general manager, for the trustees in said mortgages, of the lines of the First Division Company, complainant occupied a trust position toward his employers, said trustees and the bondholders, and by making said agreement and engaging in said enterprise, was guilty of a breach of trust and fraud upon the trustees and bondholders.

4. That by reason of said fiduciary positions occupied by complainant, he is not entitled in equity to any relief. (Rec. p. 32, 33.)

The first of these averments presents the only matter of fact in issue under the replication.

The evidence on this issue of fact is as follows:

Deposition of JESSE P. FARLEY, complainant, taken by stipulation, March 15, 1882. Direct examination, in substance:

The allegation in the bill: "And your orator states that after said agreement between him and said Kittson and Hill, and before the decrees of foreclosure in said suits, and before the purchase of said bonds, or any of them, and while negotiations were pending for the purchase of the bonds represented by said Kennedy, he, said plaintiff, informed said Kennedy of his said interest and connection with said Kittson and Hill in the project for the purchase of said bonds, and that said Kennedy had full notice and knowledge that he was so connected therewith and interested therein, and fully approved and sanctioned the same," is true, every word of it. (Rec., p. 40.)

I have in my possession, and here produce, a letter from said Kennedy relating to that matter, as follows:

"Confidential.

"41 Cedar Street, New York, 25th Feb'y, 1878.

"J. P. FARLEY, Esq., St. Paul, Minnesota:

"*Dear Sir:* We are in receipt of your favor of 22d inst., and will send you the particulars you desire with pleasure, but two of our clerks are away sick, so that we are short-handed, and we will have to ask you to excuse us till to-morrow or next day. We think it will pay you to take an interest with K. and H., and we are glad to hear that they have offered it to you.

"The purchase has now been concluded. We have so advised the committee at Amsterdam by cable to-day, and it will be publicly announced there to-morrow morning. The writer telegraphed you to-day, as trustee, to remit $4,800, to pay the interest due 1st March on the $120,000 issue of Branch Line bonds. Yours very truly,

"JOHN S. KENNEDY."

(Rec., p. 41.)

This was in answer to a letter I wrote him dated Feb. 22, 1878, on the subject of the purchase of the St. Paul & Pacific First Division bonds and Extension Line bonds from the Dutch committee. I wanted to know if Mr. Kennedy had any objections to my being interested with Kittson and Hill in the purchase of the bonds, knowing Mr. Kennedy to be the representative of said bonds in America.

In my letter of Feb. 22, 1878, I mentioned the names of Kittson & Hill in connection with the enterprise of purchasing the bonds. The letters "K. & H." in this letter of John S. Kennedy mean Norman W. Kittson and James J. Hill.

Subsequent to the receipt of this letter from John S. Kennedy I had a conversation with him in his private office, 41 Cedar St., N. Y., about my being interested with Kittson & Hill in the purchase of the bonds. Mr. Kennedy made no objections, but rather seemed to be gratified. He thought it was a good thing for me, and only advised me to ascertain how much money it would be necessary for

me to raise to carry out the project. To the best of my recollection this was in the month of April, or very early in May, 1878. The date of the agreement with the Dutch committee for the purchase of the bonds was March 13, 1878. (Rec. p. 42.)

The allegation in the bill: "And your orator says that to all inquiries made by said Kennedy, or any of the trustees in said mortgages, or by any of the holders of any of the bonds secured thereby, or by any one interested in the property under his charge, as manager and receiver, he at all times gave full and true answers and information to the best of his knowledge and ability, and kept said Kennedy fully informed of all facts, matters and things coming to his knowledge affecting said property, and in all things acted honestly and in good faith toward all persons interested in the property under his control, as receiver and manager as aforesaid,"—is true in fact. (Rec. p. 43.)

The defendants offered no evidence in support of their plea; and upon this, the only fact in issue, their averment is clearly disproved.

The remaining averments contained in the plea, raise only the question of constructive fraud. No facts are alleged which would constitute actual fraud.

1. There is no averment of any fraud, actual or constructive, in the enterprise itself. The only charge is that complainant, as receiver and as general manager could not lawfully engage in it; not that the undertaking was fraudulent.

2. There is neither any admission or statement in the bill, nor any averment in the plea, nor any proof in the record, of any intention or combination to injure, or of any actual pecuniary injury or damage to any person interested in the mortgaged property as creditor, stockholder or bondholder.

3. By the general averment that the interest of complainant in this purchase was a fraud on the court, the trustees, and the bondholders, only a constructive fraud can be in-

tended, because no facts are set up which would constitute actual fraud.

It is well settled that a general charge of fraud will not be regarded. The facts constituting the alleged fraud must be distinctly stated and clearly proved.

*Van Weel* v. *Winston*, Supreme Court U.S., Oct. T., 1885.

"Fraud consists of intention, and that intention is a fact which ought to have been averred, for it is the gist of the plea, and would have been traversable."

*Moss* v. *Riddle*, 5 Cranch. 351.

"In equity, as at law, fraud and injury must concur, to furnish grounds for judicial action; a mere fraudulent intent, unaccompanied by any injurious act, is not the subject of judicial cognizance."

*Clarke* v. *White*, 12 Peters, 196.

To constitute actual fraud there must be not only contrivance, design or intention to injure another, but actual damage or injury resulting to some one is a necessary element, which must be alleged and proved. Actual fraud will never be presumed.

*Conard* v. *Nicoll*, 4 Peters, 297.
*United States* v. *Arredondo*, 6 Peters, 716.

Where the allegation is of actual fraud, relief can not be given on the ground of constructive fraud, and *vice versa*. The complainant can only recover *secundum allegata et probata*.

"Although cases of constructive fraud are equally cognizable, by a court of equity, with cases of direct or positive fraud, yet the two classes of cases would be met by a defendant in a very different manner. It seems to be an established doctrine of a court of equity, that when a bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff will not be entitled to a decree, by establishing some of the facts quite independent of fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable

to the case of fraud originally stated. In support of this position may be cited, as directly in point, the case of *Price* v. *Berrington*, decided by Lord Chancellor Truro, in 1851, *vide* English Law and Equity Rep., Vol. 7, p. 254."

*Eyre* v. *Potter*, 15 How. 42.

Although the pleas in the case at bar raise only the question of constructive fraud, and actual fraud is neither alleged nor proven, yet defendants' counsel, in their argument below, charged, and the learned judge below based his opinion on the supposition, that fraud in fact had been shown.

Counsel said in their printed argument:

"This is not a question of a purchase by a trustee or his agent from a *cestui que trust*, or a purchase of trust property by the trustee or agent at a judicial or other sale, where the character of the transaction is to be determined in the absence of proof of actual fraud. Those cases the courts pronounce a constructive fraud. In case of a purchase of trust property by a trustee or his agent, the sale will be set aside, as of course, on application of the *cestui que trust*, irrespective of any question of actual fraud or damage." (1 Lead. Cas. in Eq., 4th Am. Ed., Part 1, pp. 239, 240, etc.)

"But in this case there is no need to act on presumptions. The bill itself shows that the plaintiff deliberately entered into a conspiracy to defraud his *cestuis que trust* in the purchase of the bonds and in the purchase of the mortgaged property. The agreement itself, and every step taken to carry it out, contain every element of the grossest actual fraud. * * * And the enormous profit of $15,000,000, that was realized, whether it was made in the purchase of the bonds, or in the purchase of the mortgaged property, or, as is most likely, in both purchases, shows not only that the plaintiff's conduct was grossly fraudulent, but that he was utterly reckless of the ruin which his fraud might work upon his *cestuis que trust*." * * * "In this case the receiver, the trusted confidential officer of this court, has not only defrauded every person and class of persons interested in the property in his charge, but to accomplish this purpose he

has willfully deceived the court. To the guilt of fraud upon his *cestuis que trust* he has added the guilt of a fraud upon the court, a fraud upon the administration of justice."

It was doubtless such baseless assertions as these, nowhere admitted in the bill nor alleged in the plea, entirely unsupported by any evidence in the record, which induced the learned court below to pronounce this enterprise fraudulent in fact. As we have already shown, not only is there an utter absence of complaint by any creditor, stockholder or bondholder, but there is neither allegation nor proof in the record that any creditor, stockholder or bondholder has been injured to the amount of a single cent. No averment that the bonds were bought at less than their real value, or that less than the full value was paid for the railroad lines and property. The court is asked to presume all this actual fraud from the bare fact that a large profit has been realized, and this on a plea which raises only the question of constructive fraud.

The argument of defendant's counsel, as well as the opinion of the court below, are based upon the proposition that complainants' interest in this purchase, was *ipso facto*, a fraud upon the court, and involved moral turpitude. It is tacitly admitted, and the authorities cited by defendant show, that if complainant had been an executor, administrator, guardian, director, trustee, assignee in bankruptcy, or had held any other fiduciary relation than that of receiver, a purchase by him of the trust property would have been voidable only by the *cestui que trust*, and not by defendants. The argument is, that owing to some peculiarly sacred considerations attaching to the office of receiver of an insolvent railroad company, as distinguished from any other fiduciary relation, this particular purchase is absolutely void and a fraud on the court.

This distinction is not supported by reference to any text writer or adjudicated case, and is contrary to all the authorities we have been able to find on the subject.

There could have been no fraud on the court, unless a fraud were in some way perpetrated on some person or class of persons whose interests were under the protection of the court. We submit we have already shown that no fraud was perpetrated on the creditors, stockholders or bondholders, the only persons interested in the property.

The fraud upon the court in this case, according to defendant's counsel, consists in the fact that complainant being a receiver of a portion of the property, was interested in its purchase, and failed to disclose such interest to the court. The only evidence offered on this subject is that of complainant, who testified, on cross-examination, that he did not sooner inform Kennedy of his interest with Kittson & Hill for fear it would become public and the attorneys for the stockholders would go to the court and have a receiver appointed of the lines of the First Division Company of which he was not receiver, but which were then in the hands of the trustees in the mortgages, for whom complainant was general manager; and that an action of ejectment had already been brought against the trustees.

Complainant further testified in substance:

The reason why, after I got Kennedy's letter of February 25, 1878, I did not have my name put into the agreement of March 13, 1878, along with Smith, Stevens, Kittson & Hill, was the same cause that existed from the beginning—stockholders carrying on this war for the possession of the property. I have no doubt I was present on May 31, 1878, at Davenport, when Judge Dillon made the order authorizing me to go on and complete the extension lines with money to be furnished by Smith, Stevens, Kittson & Hill, and heard the order read. I remember the fact that Smith, Stevens, Kittson & Hill had made that agreement and bought the bonds under it, was talked over by Judge Dillon at the time the order was made and at previous hearings before him at Des Moines on said application. The money, it was understood, was to be raised by Mr. Stevens, but I recollect they were all parties to the contract. I did not, at the time that order was made, or at any time, in-

form Judge Dillon I was equally interested with Kittson & Hill under the agreement of March 13, 1878. I did not think it was a thing that interested him at all; I intended to go on and finish the road according to his order, if they furnished the money. (Rec. p. 45.)

"Int. 20. You have stated that the reason why your connection with the enterprise was kept secret was that if it were known the stockholders of the First Division Company would take steps to have you removed from the management of the lines of that company and have a receiver appointed; were you not also afraid that the court, whose receiver you were of the extension lines, would also consider your interest in such a project a sufficient reason to remove you from your office of receiver?

"A. We never thought much of the court unless somebody moved in the matter. I don't think that subject was ever mentioned between Kittson, Hill and myself."

"Int. 21. But you thought that if it were generally known that you were interested with Kittson & Hill it might lead to your removal as general manager of the First Division Lines, and the appointment of a receiver of those lines, and this aspect of the case was frequently considered between you, was it not?"

"A. Yes sir, we were afraid the stockholders would move in the matter."

I shared to some small extent the opinion of Mr. Kittson that if I were so removed, and a receiver appointed, the whole enterprise would be worthless.

"Int. 24. Why couldn't the bonds be bought and used in paying for the property at a foreclosure sale, no matter who was general manager or receiver?"

"A. The past management of the property had been, in our opinion, so reckless and dishonest that if the stockholders got possession of it, even for only a few months, they could hide and steal everything they could lay their hands on. A man only wants to look into the matter of the former management of the extension lines particularly, to come to the same conclusion that we did." (Rec. p. 46.)

This is the only evidence on the subject, and shows:

(1) That complainant's failure to disclose his interest in the purchase had no relation to his office as receiver of the Extension Lines, and was not induced by fear of removal as such receiver.

(2) That the only motive for concealment was the fear that the stockholders might use this as a pretext for ousting the trustees of the bondholders from the possession of the main and branch lines of which complainant was general manager.

(3) That this action of complainant was taken in behalf of the bondholders and their trustees, as against the stockholders, and the reason assigned by him is that, considering how reckless and dishonest the past management had been, there was ground for believing that if the stockholders got possession, for only a few months, they could hide and steal everything they could lay their hands on.

If this were an application by the stockholders to set aside this purchase as a fraud on their rights, this might become a pregnant evidence, if, in addition, the stockholders alleged and proved a damage resulting to themselves. But it is to be observed: (1) The stockholders make no such application. (2) The record shows they had at that time no pecuniary interest in the property, and hence could have sustained no damage from the action and attitude of complainant. (3) The fears of complainant as to the results if the stockholders should get possession, seem to be amply justified by the evidence in the record.

The bill in the Kennedy suit, filed July 14, 1873, alleges in regard to the stock of the St. Paul and First Division Companies; and in regard to the management of the property by those corporations and their stockholders:

That the whole property of said two companies will not suffice to pay their debts, and the shares of their capital stock are of no actual value as property. (Rec., p. 66.)

That the whole of the capital stock of these two companies was falsely and fraudulently issued as full paid stock without any payment therefor to the companies (Rec. p. 62),

and has been transferred, for a nominal consideration, to the Northern Pacific Railroad Company, which received the same with notice of such fraudulent issue, and has constituted out of its directors the boards of directors of said St. Paul Company and said First Division Company, and thereby controls the finances, lands and property of said two companies. (Rec. p. 62.)

That said First Division Company, under the control of these directors, has failed to apply the proceeds of the extension bonds to the construction of the extension lines, but has wrongfully diverted said proceeds to other purposes. (Rec. p. 62.)

That the lands which the St. Paul Company would become entitled to by the completion of said extensions, viz.: 1,472,000 acres, would be worth $6 per acre, in all $8,832,000.

That by the construction of the completed portion of said extension, the St. Paul Company became and is entitled to 500,000 acres of contiguous land, worth $6 per acre, but said company and the First Division Company and the trustees in the extension mortgage, neglected to select and enter said lands and procure the lists thereof, so that the title thereto never vested in the St. Paul Company; and such neglect was in the interest of and instigated by the Northern Pacific Company, which has applied for, and on January 14, 1873, actually obtained patents for 29,782½ acres of valuable lands which belonged of right to said St. Paul Company, and were included in said extension mortgage; and said Northern Pacific Company claimed other lands to which the St. Paul Company were entitled, included in said extension mortgage; that said First Division and St. Paul Companies and the trustees in said extension mortgage, having neglected their duty in the premises, the bondholders applied to the Secretary of the Interior, and procured his decision that the claims of the Northern Pacific Company were invalid, and said patents were erroneously issued, and the right to the lands was in the St. Paul Company, but said company and the First Division Company and said trustees, notwithstand-

ing, still neglect to secure to the St. Paul Company the title to said lands.

That by the terms of their respective land grants, if the Northern Pacific Company could prevent the construction of the line of the St. Paul Company south of Glyndon, until December 3, 1873, more than 128,000 acres of land, worth $768,000, which by said decision belong to the St. Paul Company, and are included in said extension mortgage, would be forfeited and pass to the Northern Pacific Company, and this would deprive the St. Paul Company of the benefit of said decision to the extent of one half the lands affected thereby. (Rec. p. 63.)

That the Northern Pacific Company is still attempting to resist and reverse said decision, to defeat the land grant of the St. Paul Company, and to secure said lands to itself, and to that end to hinder and defeat the completion of said lines of railroad within the time limited.

That of the bonds issued under said extension mortgage, Moorehead & Becker have wrongfully diverted the proceeds of $1,500,000, to the completion of the main line of the First Division Company, from St. Anthony to Breckinridge, in fraud of said bondholders. (Rec. p. 64.)

That the management of the business and finances of said companies has been wasteful and ruinous to the interests of said companies and of the bondholders. (Rec. p. 65.)

That the former trustees in said extension mortgage have neglected the interests of the bondholders; that said Moorehead has all the time been in the employ of said Northern Pacific Company, and acted under its control and in its interest, and has disregarded the interests of said First Division Company and extension bondholders.

That said Becker has been and is president of said First Division Company, and has consented to and participated in said acts and doings of the Northern Pacific Company and said Moorehead. (Rec. p. 67.)

This bill was in evidence for the purposes of the hearing

on the plea, by stipulation. (Rec. p. 52.) It is the bill upon which complainant was appointed receiver of the extension lines. Its averments are made absolutely and not upon information and belief, are verified by oath, and are uncontradicted in this record. It was a bill filed in behalf of the bondholders as against the stockholders and their management. The foregoing delinquencies, wrong doings and misappropriations, by the officers and directors of the St. Paul and First Division Companies, in fraud of the bondholders, and in the interest of the Northern Pacific Company, a rival line, which owned nearly all the stock of these two corporations, were known to complainant and fully explain his testimony. These were the causes which led to ousting the stockholders from the possession of the extension lines and the appointment of a receiver; and also to the removal of Moorehead and Becker as trustees, the substitution of Kennedy, and the taking possession of the main and branch lines by the trustees of the bondholders.

No injury is shown to have resulted to the stockholders from their ignorance of complainants' interest in the purchase. The purchase of the bonds was not concealed. It was publicly announced in Amsterdam, was known to the Dutch bondholders and to their agent and representative. The agreement of purchase was spread upon the files and records of the court, in the order of May 31, 1878, in a suit to which the stockholders, by their representatives, were parties. The alleged concealment was of complainants' interest in the purchase, and of this, or of the purchase itself, no stockholder has ever complained.

That the defendants in this case fully appreciated the the real extent and value of the stockholders' interest in this property, is shown by the fact that their plea does not allege any fraud, either actual or constructive, upon these corporations or their stockholders. The averment is, that as receiver, "the making of such an agreement and the embarking in such an enterprise by him (complainant) was a breach of trust on his part as such receiver, and a fraud on the holders of the bonds of said $15,000,000 issue, and was

a fraud upon this court, whose receiver he was." And as general manager "that by making the agreement and engaging and continuing in the enterprise of purchasing the said bonds and said mortgaged property mentioned in his said bill, the said Farley was guilty of a breach of trust toward and a fraud upon the said trustees and the said bondholders." (Rep. 32.)

The stockholders are nowhere mentioned in this plea. It is only the court, the bondholders and their trustees, as to whose interests these defendants show any solicitude.

## III.

IN THE ABSENCE OF ACTUAL FRAUD, THE INTEREST OF COMPLAINANT IN THIS PURCHASE IS NOT VOID BY REASON OF SUCH FIDUCIARY RELATIONS. IT IS VOIDABLE ONLY BY THE CESTUIS QUE TRUST, AND NOT BY DEFENDANTS.

1. On August 1, 1873, complainant was appointed receiver of the property of the St. Paul Company. This consisted solely of the franchise to build the extension lines from St. Cloud to St. Vincent, etc., subject to the mortgage to secure $15,000,000 of bonds, and subject to a lease of these extensions to the First Division Company for 99 years. Of the 370 miles embraced in these extensions, only 139 miles were then completed. Complainant was appointed receiver that he might build and finish the extension lines.

2. The bill on which complainant was appointed receiver was not filed for the purpose of foreclosing any mortgage. It contained no specific averment of default in the payment of principal or interest of the bonds secured. The grounds of relief stated were the failure of the First Division Company to comply with its construction contract; the misappropriation of the proceeds of $15,000,000 of bonds to other purposes than the completion of the extension lines; the collusion of the officers and directors with the Northern Pacific Railroad Company to obstruct and delay the building of the extension lines within the time required by law, with

a view to the forfeiture of the land grant and its acquisition by the Northern Pacific Company; and the prayer is that the court shall appoint a receiver, and give him power to issue debentures and procure funds to construct the railroad and secure the land grant; that the lands and other property, or so much as necessary, be sold to pay the cost of completing the construction, "*and that after said extensions shall be completed and the title to said lands secured,*" the said extension mortgage may be foreclosed, etc. (Rec. p. 68.)

The Kennedy bill was filed July 14, 1873. The supplemental bill filed in the same cause August 2, 1875, did allege specifically a default in the payment of the semi-annual installment of interest on the bonds, due January 1, 1875; that complainants caused interest coupons amounting to $263,865, to be presented for payment, which was refused for want of funds, whereupon the coupons were duly protested; and prayed a decree of foreclosure and sale; but this supplemental bill was on December 18, 1875, withdrawn and dismissed by consent of parties. (Rec. pp. 96, 99.)

The stipulation under which this bill and supplemental bill were introduced in evidence, provided they should control the averments of the bill and plea herein as to the purposes of said suit.

3. These railroad lines and mortgaged property were not sold until May and June, 1879, on foreclosure decrees entered in March and April, 1879, in the several suits pending to foreclose the several mortgages. The bill of complainant alleges that in 1876 there were five several suits pending in courts of that State for that purpose. (Rec., p. 19.) This is nowhere contradicted. At the time the Kennedy bill was filed, July 14, 1873, there were outstanding on three issues of bonds secured by mortgages executed by the St. Paul Company, and on one issue of bonds secured by mortgage executed by the First Division Company, on the Branch Line from St. Paul to Watab, $2,750,000. Also on two issues of bonds secured by mortgage executed by the First Division Company, on its Main Line from St. Anthony to Breckinridge, $8,950,000 (Rec., pp. 56, 57), in addition to

the $15,000,000 secured by the Extension Mortgage on the line from St. Cloud to St. Vincent. It was obviously necessary to file separate foreclosure bills on the separate trust deeds conveying to different trustees different pieces of railroad property to secure bonds of different issues.

4. Complainant did not buy the railroads or mortgaged property at the foreclosure sales. There is no evidence he was present, or bid. The roads, etc., were purchased by, and subsequently turned over to, the St. Paul and Manitoba Company, defendant herein. Complainant simply had an interest in the bonds which were used in payment for the railroads, and consequently an interest in the property acquired through the use of the bonds at the foreclosure sales.

5. Complainant did not in any sense buy property at his own sale, or property he was authorized to sell. He was never given the power to sell these railroad lines. They were finally sold at public auction, pursuant to foreclosure decrees duly entered by the court, and the sales were afterward confirmed by the court. There is no pretense that complainant conducted these sales, and the presumption is they were made in accordance with the usual practice, by the master in chancery.

In the case of *Fisk* v. *Barber*, 6 Watts & Sergeant, 18, the court held that the assignee of an insolvent debtor is not incapable, by reason of his fiduciary character, of becoming the purchaser of the debtor's real estate, when sold by the sheriff, upon a mortgage which incumbered it before the time of the assignment. This was put upon the ground that the trustee was not in this case both buyer and seller at the same time; that the sale was at public auction, by an officer of the law, and was in no respect under the control of the trustee. The property having been "taken out of his possession, as it were, and certainly out of his power, by the authority of the law, which is paramount to any he has as trustee, and placed in the hands of the officer of the law, to whom full power is given to sell and dispose of the same, it is perfectly manifest that he thereby becomes divested of his

trusteeship in regard to it; that all his power and control over it cease, so that he has no duty whatever to perform in respect to it, in the slightest degree incompatible with his buying at the lowest price for which it may be obtained; and as to the sale to be made by the sheriff, it is impossible to conceive how the trustee can exercise any control or influence over it, to the prejudice of those whose interest it is to have the property sold for the highest possible price, that any other individual, disposed to buy, may not exert."

Notwithstanding the very able dissenting opinion by Rogers, J., the rule laid down by the majority of the court was affirmed and followed in the case of *Cadbury* v. *Duval*, 10 Barr. 265; and in *Chorpenning's Appeal*, 32 Pa. State, 315, where it was held that the doctrine that a party will not be allowed to purchase and hold property for his own use and benefit, when he stands in a fiduciary relation to it, does not apply when the sale is made by a public officer, under proceedings adverse to the interest of the *cestui que trust*, and the trustee has not the means in his power to prevent the sale.

See also the case of *Sheldon* v. *Estate of George W. Rice*, 30 Mich. 296. *Doe* v. *Hassell*, 68 N. C. 213, affirmed and followed in *Lee* v. *Howell*, 69 N. C. 200, establish the same rule in North Carolina. In the former case the court say: "What objection can there be to a guardian bidding at a sale made by a commissioner under a decree of the court? * * * This is quite different from the case of a guardian purchasing at his own sale, where he is both the seller and purchaser, as in the cases cited by plaintiff's counsel."

That such circumstances are and ought to be of great weight in determining the equities of the parties, and the *bona fides* of the purchase, is shown by the remarks of this court in the case of *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587:

"If it be conceded that the contract by which the defendant became the creditor of the company was valid, we see no principle on which the subsequent purchase under the

deed of trust is not equally so. The defendant was not here both seller and buyer. A trustee was interposed who made the sale, and who had the usual powers necessary to see that the sale was fairly conducted, and who in this respect was the trustee of the corporation, and must be supposed to have been selected by it for the exercise of this power. Defendant was at liberty to bid, subject to those rules of fairness which we have already conceded to belong to his peculiar position, for if he could not bid, he would have been deprived of the only means which his contract gave him, of making his debt out of the security on which he had loaned his money."

The project into which complainant entered, together with Smith, Stevens, Kittson & Hill, consisted of two parts only: (1) The purchase of the bonds from the several holders who were willing to sell. (2) The use of the bonds so purchased in payment for the mortgaged property at the foreclosure sales.

(1) Complainant's office of receiver of the property of the St. Paul Company, did not make unlawful his interest in the project, so far as it consisted in the purchase of the bonds from the bondholders. These bonds were no part of the trust property in his possession or control as receiver. They were the individual property of the bondholders, and not of the railroad company. There was no trust relationship existing between complainant and the individual bondholders, in respect to the bonds held and owned by them. His fiduciary relation was limited to the specific property of which he was appointed receiver. In the absence of any actual fraud complainant could as lawfully go into the market where the bonds were offered for sale, and buy them, or an interest in them, as any other person.

It can not be claimed that a receiver of the property of a railroad company holds any fiduciary relation to the bondholders in respect to the bonds owned by them, more than the managers or directors of the company hold a fiduciary relation to the individual stockholders in respect to their

stock. The law is well settled that such relation does not exist in the latter case.

In "The *Board of Commissioners of Tippecanoe County* v. *Reynolds*, 44 Ind. (Black), 509, a bill was filed by a stockholder to set aside a purchase of his stock by the president and director of the railway corporation, for much less than its real worth, but at its then market value. The court held, after a careful review of the authorities, that the relation of trustee and *cestui que trust* does not exist in such a case; that the trust relationship between the directors and the stockholders extends only to the management by the directors of the property and general affairs of the corporation. The court said: "Stock in a corporation held by an individual is his own private property, which he may sell or dispose of as he sees proper, and over which neither the corporation nor its officers have any control. It is the subject of daily commerce, and is bought and sold in the market like any other marketable commodity. The directors have no control or dominion over it whatever, or duty to discharge in reference to its sale or transfer, unless to see that proper books and facilities are furnished for that purpose. As the property of the individual holder, he holds it as free from the dominion and control of the directors as he does his lands or other property." * * * "Such being the nature of the interest of the stockholder in his stock, and the directors having no control, power or dominion over it, or duty to discharge in reference to it, beyond the duty devolving upon them to prudently manage the affairs and property of the corporation itself, it seems to us to be very clear, that in the purchase of stock by a director from the holder, the relation of trustee and *cestui que trust* does not exist between them." The following cases were cited.

*Van Allen* v. *The Assessors*, 3 Wall, 573.
*Spering's Appeal*, 71 Pa. St. 11–20.
*Smith* v. *Hurd*, 12 Met. 371.
*Allen* v. *Curtis*, 26 Conn. 456.
*Carpenter* v. *Danforth*, 52 Barb. 581.

In *Van Allen* v. *The Assessors*, *supra*, Mr. J. Nelson, delivering the opinion of the court, that the shares of stockholders of national banks are subject to State taxation, said:

"The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him."

In *Spering's Appeal*, 71 Penn. St. 11–20, the court said: "It is by no means a well settled point what is the precise relation which directors sustain to stockholders. They are undoubtedly said in many authorities to be trustees, but that as I apprehend is only in a general sense, as we term an agent or any bailee intrusted with the care and management of the property of another. It is certain that they are not technical trustees."

*Smith* v. *Hurd*, 12 Met. 371, was an action on the case brought by an individual holder of shares in an incorporated bank against the directors, setting forth various acts of negligence and malfeasance through a series of years, in consequence of which, as the declaration alleged, the whole capital of the bank was wasted and lost, and the shares of the plaintiff became of no value. The court said: "There is no legal privity, relation, or immediate connection, between the holders of shares in a bank, in their individual capacity, on the one side, and the directors of the bank on the other. The directors are not the bailees, the factors, agents or trustees of such individual stockholders."

In *Allen* v. *Curtis*, 26 Conn. 456, a similar case, the Court said: "Besides, the directors of the bank are the agents of the bank. The bank is the only principal, and there is no such trust for, or relation to, a stockholder as has been claimed by the plaintiff. The entire duty of the directors,

growing out of their agency, is owed to the bank, which, under the charter, is the sole representative of the stockholders, and the legal protector and defender of their property."

"In the case of *Carpenter* v. *Danforth*, 52 Barb. 581, Danforth, who was one of the trustees or directors of the corporation, purchased of the plaintiff 136 shares of the stock of the National Bank Note Company; and the purpose of the action was to have the sale declared void, and to have the plaintiff restored to the rights and interests which he would have had if the sale had not been made—upon the ground of fraud and undue influence. It was held that the relation of trustee and *cestui que trust* did not exist."

As general manager for the trustees in possession of the main and branch lines of the First Division Company, of which he was never receiver, complainant was at liberty, the same as any other person, to buy the bonds or the mortgaged property which were not embraced in his trust. These lines were included in separate mortgages and were sold under several decrees at separate sales for different amounts, easily ascertainable from the records of the court. Nothing is advanced by counsel for defendants to sustain their plea in this respect, or to show, either by way of proof or argument, that the court below did not clearly err in the decree dismissing the bill, so far as it related to these lines.

In *Eldridge* v. *Smith*, 34 Vt. 484, the court held that a trustee may purchase, the same as any other person, the property of the *cestui que trust*, not embraced in the property committed to his charge.

There are authorities which go further and hold that the managers or directors of a corporation are not trustees of its property in such a sense as to disable them from purchasing the property and stock belonging to it with the same effect as though they were not managers or directors.

Angel & A. on Corporations, 214, and cases cited.
*Harts* v. *Brown*, 77 Ill. 226.
*The City* v. *Alexander*, 23 Mo. 483.
See also *Sargent* v. *Webster*, 13 Met. 497.

(2) If there was anything unlawful in complainant's interest in this purchase, it consisted in the use of the bonds purchased in acquiring that portion of the railroad lines, etc., of which he was receiver.

The right to so use the bonds was inherent to their ownership; it was an incident attached to them by the terms of the mortgages under which they were issued, and was guaranteed to every bondholder by the express provisions of the foreclosure decrees under which the property was sold.

This use of the bonds could, at most, render the transaction voidable only, and not absolutely void; and voidable only by the *cestuis que trust*, and not by defendants.

In *Michaud* v. *Girod*, 4 How. 553, this court held, that if a trustee, or any person acting for others, sells the trust estate and becomes himself interested in the purchase, the *cestuis que trust* are entitled, as of course, to have the purchase set aside. That was a bill filed by certain heirs of a deceased testator against one of his executors, to set aside a purchase by the executors, through an agent employed by them, of the property of the testator, in fraud of complainant's rights. The rule was extended to trustees, agents, attorneys, arbitrators, commissioners of bankrupts, assignees of bankrupts, solicitors to the commission, auctioneers, guardians, administrators, and all other persons who by their connection with any other person, or by being employed or concerned in his affairs, have acquired a knowledge of his property. All these are held incapable of purchasing the trust property except under certain restraints, *i. e.* that the sales will be set aside on the application of the *cestui que trust*. But nothing in that decision intimates that such a purchase will be set aside at the instance of a stranger or any other person than the *cestui que trust*.

In *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. R. 587, a bill was filed to set aside a purchase by a director of the property of the corporation. The court said:

"That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the

subject-matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and in others. *Koehler* v. *Black River Falls Co.*, 2 Black, 715; *Drury* v. *Cross*, 7 Wall. 299; *Luxemburg R. R. Co.* v. *Magway*, 25 Beav. 586; *The Cumberland Co.* v. *Sherman*, 30 Barb. 553; 16 Md. 456. The general doctrine, however, in regard to contracts of this class, is, not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under it. We say this is the general rule, for there may be cases where such contracts would be *void ab initio:* as where an agent to sell buys of himself, and by his power of attorney conveys to himself that which he was authorized to sell. But, even here, acts which amount to a ratification by the principle may validate the sale."

See also *Richard* v. *Holmes*, 18 How. 143.
*Badger* v. *Badger*, 2 Wall. 87.
*Marsh* v. *Whitmore*, 21 Wall. 178.

*Badger* v. *Badger* was a bill filed by the heir to set aside a purchase by an administrator of the trust estate. *Marsh* v. *Whitmore* was a purchase by an attorney at his own sale, of the bonds of his client. In each case the court held the purchase was voidable only by the *cestui que trust*, but the remedy was barred by laches and acquiescence.

In *Pacific R. R. Co.* v. *Ketchum*, 101 U. S. R. 289, the court held that a purchase, by the solicitor of a railroad company, of its property at foreclosure sale, was not necessarily invalid.

It is true in *Pacific R. R. Co. of Mo.* v. *Missouri Pacific Railway*, 111 U. S. R. 505, on a bill filed to set aside these foreclosure proceedings on the ground of actual fraud, on demurrer the court held the facts alleged sufficient for relief. But the decision does not overrule or modify the rule of law announced above.

In *Thomas* v. *Brownville, &c., R. R. Co.*, 109 U. S. R. 525, on a bill to foreclose a railroad mortgage, made to secure bonds issued to a construction company, there had been a foreclosure decree and sale. Then stockholders intervened, praying to set aside the sale and the mortgage, on the ground of fraud. The fraud set up in their answer and cross-bill, and proven, was (1) that two of the directors of the company were interested in the construction contract; (2) that the parties securing the construction contract assumed the liability of all of the directors on their unpaid stock subscriptions, and relieved them therefrom. The Circuit Court held the construction contract, as well as the bonds, absolutely *void*, and dismissed the bill. This court reversed the decree on the following ground, as stated in the opinion:

"But as this court said in the case of the *Twin Lick Co.* v. *Marbury*, 91 U. S. R. 587, such contracts are not absolutely void, but are voidable at the election of the parties affected by the fraud. It may often occur that, notwithstanding the vice of the transaction, namely, the directors or trustees, or a majority of them, being interested in opposition to the interest of those whom they represent, and in reality parties to both sides of the contract, that it may be one which those whose confidence is abused may prefer to ratify or submit to. It is therefore at the option of these latter to avoid it, and, until some act of theirs indicates such a purpose, it is not a nullity."

Held, also, notwithstanding the invalidity of the contract, the decree below must be reversed so far as to allow the construction company to recover $205,947.66, actually expended by them in building the road, over and above what they had already received payment for.

The rule that such purchases are voidable only, and not void, and will be set aside only at the instance of the *cestuis que trust*, is not only settled in this court, but is recognized and enforced in every other court, and is the established law both in England and this country.

It has been applied to purchases by trustees, generally: *Davove* v. *Fanning*, 2 Johns. Ch. 252; *Wilson* v. *Troup*, 2

Cowen, 238, and numerous cases cited. Purchases by executors and administrators: *Harrington* v. *Brown*, 5 Pick. 519; *Ives* v. *Ashley*, 97 Mass. 198; *Jackson* v. *Walsh*, 14 Johns. R. 414; *Richardson* v. *Jones*, 3 Gill. & J. 184; *Williams' Executors* v. *Marshall*, 4 Gill. & Johns. 379; *Mitchell* v. *Dunlap*, 10 Ohio, 118; *Beeson* v. *Beeson*, 9 Barr. 280; *Thorp* v. *McCullom*, 1 Gilm. 615; *Williams* v. *Rhodes*, 81 Ill. 571; *Baldwin* v. *Allison*, 4 Minn. 25. Purchases by directors: *Ashurst's Appeal*, 60 Pa. St. 314; *Buell* v *Buckingham*, 16 Ia. 284. Purchase by guardian: *Gallatin* v. *Cunningham*, 8 Cowen, 384. Purchase by attorney: *Hawley* v. *Cramer*, 4 Cowen, 717. Purchase by sheriff: *Lessee of Lazarus* v. *Bryson*, 3 Binney, 54. Purchase by commissioner in chancery: *McConnell* v. *Gibson*, 12 Ill. 128. Purchase by assignee: *Ex Parte Wiggins*, 1 Hill Ch. 353. Purchase by receiver: *Jewett* v. *Miller*, 10 N. Y. 402.

The distinction sought to be made in the brief of counsel for defendants below, between purchases by receivers, and those by other persons standing in fiduciary relations; and the claim that the former are absolutely void, while the latter are voidable only, rests upon no sound foundation, either of principle or authority. No adjudicated case is cited, nor do we believe an authority can be found to support such a distinction.

In the notes of Hare & Wallace to *Fox* v. *Mackreth*, 1 Lead. Cas. in Eq. (3 Am. Ed. p. 209), after stating in the broadest terms the rule rendering purchases by trustees voidable only, the learned authors say:

"And this principle applies to executors, administrators, guardians, attorneys at law, general and special agents, assignees, commissioners, sheriffs, and all persons, judicial or private, ministerial or counseling, who, in any respect, have a concern in the sale of property for others."

The same broad rule is laid down in *Thorp* v. *McCullom*, 1 Gilm. 615, and applied to trustees, assignees, commissioners and solicitors of bankrupts, executors, administrators, guardians, agents, and officers of the court.

See also High on Receivers, Sec. 193.

*Jewett* v. *Miller*, 10 N. Y. R. 402.
*Carr* v. *Houser*, 46 Ga. 477.
*Alvan* v. *Bond*, 3 Ir. Eq. 365.

In *Jewett* v. *Miller*, *supra*, a purchase by a receiver at a master's sale, of a part of the trust property, was held voidable only by the *cestuis que trust*.

In *McConnell* v. *Gibson*, 12 Ill. 128, the same was held of a purchase through an agent by a commissioner in chancery at his own sale, of the real estate he had been appointed by the court to sell.

In the case of *Pierce* v. *Benjamin*, 14 Pick. 356, the collector of taxes had sold certain property at public sale for non-payment of taxes. He was the highest and best bidder at his own auction, and struck off the property to himself. The court held this was clearly a violation of his official duty, and then said: "But a sale *by an officer*, or other trustee, to himself, is not absolutely void. The *cestui que trust* has an option to affirm or avoid it, as he may judge most advantageous to himself; as the plaintiff has made no election to annul the sale, by a demand of the property or otherwise, before the commencement of the action, it may well be doubted whether, upon this ground, he could recover."

In *Lessee of Lazarus* v. *Bryson*, 3 Binney, 54, where the sheriff, through an agent, had bought real estate at his own sale on execution, the court held the purchase voidable only. Tilghman, C. J., said:

"The plaintiff's counsel have endeavored to distinguish this case from that of a trustee, who sells land in pursuance of his trust, and becomes the purchaser at his own sale. The sheriff, say they, was never trusted by *Lazarus*, but derived his authority from the *law*. I can not say that I feel the force of this distinction. With respect to a purchase made by a sheriff, or a trustee, the law is confessed to be the same. In both cases the sale would be avoided. * * * If the matter is considered on grounds of public convenience, we shall find no cause for such a distinction."

Executors, administrators, assignees in bankruptcy, guardians, commissioners in chancery and sheriffs, are as much

officers of the court and of the law, as are receivers. Executors, administrators and guardians act in a capacity more highly fiduciary, and no reason is perceived why these various classes of trustees are not all subject to the same rule.

## IV.

THE MAXIM "EX TURPI CAUSA NON ORITUR ACTIO" HAS NO APPLICATION IN THE ABSENCE OF ACTUAL FRAUD. THE PURCHASE IS VALID BOTH AT LAW AND IN EQUITY UNTIL DISAFFIRMED BY THE CESTUI QUE TRUST; AND WILL BE ENFORCED ON COMPLAINANT'S APPLICATION FOR RELIEF AS AGAINST THIRD PERSONS.

In the notes of Hare & Wallace to *Fox* v. *Mackreth*, 1 Lead. Cas. in Eq. (3d Am. Ed.) the rule is thus stated:

"A purchase by a trustee is not absolutely void; it is voidable only by the *cestuis que trust*, in equity, and then only upon certain terms; it is valid in equity as well as at law, unless some of them choose to avoid it." (P. 217 and cases cited.)

"No persons but the *cestuis que trust*, that is, the persons interested in the property or in the sale of it, can apply to be relieved against the purchase by the trustee, and a stranger can not avoid the sale." (P. 218 and cases cited.)

This is the rule at law; and it is applied notwithstanding the fact that the voidable conveyance appears in, and forms a part of the plaintiff's chain of title. No case can be found where a court of law has pronounced a deed void, because made in pursuance of a sale by a trustee to himself, through the interposition of an agent or nominal purchaser. Such sales are voidable only in equity, by the persons interested in the estate before the sale. If they are satisfied with the sale, its validity can not be impeached by a stranger.

*Harrington* v. *Brown*, 5 Pick. 519.
*Knox* v. *Jenks*, 7 Mass. 492.
*Jackson* v. *Walsh*, 14 Johns. R. 408.
*Murphy* v. *Teter*, 56 Ind. 545.

In these cases the suit was brought by the party claiming under the voidable sale, which constituted an essential part of the cause of action.

The distinction between positive fraud which renders the contract or purchase absolutely void, and the effect attributed by public policy to legal or constructive fraud, which renders the purchase by a trustee of the trust property voidable only, is universally recognized. In the latter class of cases, the Court of Chancery does not denounce the transaction as morally wrong, or as in any way involving moral turpitude, but will sustain the purchase under the limitations and conditions hereinbefore mentioned.

*Beeson* v. *Beeson*, 9 Barr. 280, and cases cited.

In *Mulford* v. *Minch*, 3 Stockton, 16, on a bill filed by the administrator, who had purchased the trust estate, against the *cestuis que trust*, to enjoin ejectment, and for a confirmation of the sale, or, if the sale were held voidable, for an accounting and re-imbursement, the court held, that if the complainant had been guilty of actual fraud, so that moral turpitude could be imputed to him, a court of equity would give him no relief. But actual fraud not having been proven, the sale was held voidable only, by such of the *cestuis que trust* as had not acquiesced; as to those who had acquiesced, the sale was held binding; and an account of rents and profits, of permanent improvements, and of the purchase money, was directed, and those defendants who had not confirmed the sale were given an opportunity to redeem.

In *Thorp* v. *McCullom*, 1 Gilm. Ill. 614, John McCullom died seized of certain lands, leaving a widow and three children. The widow and one Whiteside administered. At a sale to pay debts under the order of the court, Sarah McCullom, the widow and administratrix, became the purchaser of the lands, and Whiteside, the administrator, alone executed a deed to her, but omitted to recite at large the order of the court. The premises were subsequently sold by Sarah to one Dugger and by him to Thorp, who has had pos-

session and made valuable improvements. The heirs of the intestate brought ejectment against Thorp for the land. The latter filed this bill for injunction and to perfect the administrator's deed. The court below sustained a demurrer to the bill. The Supreme Court said:

"The general principle of equity is that trustees and others sustaining a fiduciary and confidential relation, can not deal on their own account with the thing, or the persons falling within that trust or relationship. The rule is not universal, but general. Whether Sarah McCullom, the administratrix and purchaser, falls within the general rule as to this sale, is the question before us in this case, brought by purchasers from her, but with legal notice of the defect in the deed by its being recorded."

After stating the general rule holding such purchases voidable only by the *cestui que trust*, the court said:

"The demurrer only raises a question of the legality of the sale. The sale is valid in equity as well as at law, unless the *cestui que trust* elects to avoid it. Then a court of equity may and will avoid it; a court of law can not. The demurrer will not show the *will* of the party to avoid it. In *Munro* v. *Allaire*, 2 Caines Cases in Error, 183, the widow, who was entitled to an interest under a will, sold that interest to the executor. She afterward sold and conveyed to another. The executor filed a bill against both for a specific performance of his contract of purchase. The court sustained a demurrer to the bill, but it is observable in this case that the vendor had expressly elected to disaffirm, in selling and conveying to another, as shown by the bill. So the question may be regarded as open, so far as that case is concerned."

"In this case the heirs set forth nothing upon the record showing whether they wish to avoid the sale or not. However inflexible the rule may be in annulling such sales, when objected to, it has no application except at the instance, and upon the election of the *cestui que trust*, or others having an interest; for it would never be done at the instance of the purchaser, and against the will of the *cestui*

*que trust*. I am clearly of opinion that the demurrer ought to have been disallowed, so far as the mere question of the legality of the sale was concerned."

In *Rice* v. *Cleghorn*, 21 Ind. 80, a bill was filed to quiet title by purchasers from the trustee. It was held that the sale was voidable only by the *cestuis que trust*, and that third parties could not raise the objection.

In *Dunlap* v. *Mitchell*, 10 Ohio, 117, a sale of the trust estate by one executor to another, for a fair price, without actual fraud, was held voidable only and not void. The bill filed by one of the heirs to set aside the sale was dismissed because of a subsequent ratification, and the cross-bill, filed by the executor who purchased, to affirm the sale, was sustained, and the relief he prayed decreed.

In *Baldwin* v. *Allison*, 4 Minn. 25, the plaintiff in error, being an administrator, foreclosed a mortgage given by defendant in error, and at the sale purchased the land for himself and not for the estate. He then commenced this proceeding to enforce his purchase and obtain possession. The mortgagor set up that the sale was void, because the administrator bought the property in his own right. The court held the sale was voidable only by the *cestui que trust*, and, in the absence of actual fraud could not be questioned by third parties for this reason.

The court say: "It is a fiduciary relation that the administrator bears to the estate that he represents, which would prevent him from purchasing under a mortgage which he was foreclosing for the estate; but a violation of his duty in this respect may or may not be questioned at the option of the beneficiaries of the estate, but not by strangers. * * * The estate being satisfied, Allison has no right to complain, unless he can allege and show some fraud in fact."

And this case is affirmed in *Kent* v. *Chalfant*, 7 Minn. 487.

In *Ex parte Wiggins*, 1 Hill's Chancery Rep. (S. C.) 353, on a bill filed by the assignees of Baker Wiggins, the court ordered a sale of his real estate by the commissioner, under the superintendence of the assignees, who were directed to

join in the conveyance to the purchaser. At this sale R. B. Wiggins, one of the assignees, became the purchaser of the whole estate, and afterward filed this petition to confirm the sale. The court below held that the purchase "could neither be set aside nor confirmed, without knowledge of the will of other persons interested, who are not parties to this proceeding," and dismissed the petition. The Court of Appeals, while holding the sale voidable, ordered that an inquiry be made whether any of the creditors or parties interested desired a re-sale, and if not, that the petitioner's purchase should be confirmed.

In *Buell* v. *Buckingham*, 16 Ia. 284, a bill was filed to enforce the purchase by a trustee from his *cestui que trust*, by injunction against a judgment creditor whose lien accrued after the sale. Dillon, J., said:

"Now the purchase of property by an agent or trustee, or by any person acting in a fiduciary capacity, is not void *ab origine* and absolutely. It is voidable only. It is made subject to the right of the principal or beneficiary in a reasonable time, to say that he is not satisfied with it. It is valid in equity as well as at law, unless the parties interested repudiate it, or complain of it; and these may set it aside without showing either fraud or injury: *Bank of Old Dominion* v. *Dubuque Railroad* Co., 8 Iowa, 277; *Darone* v. *Fanning*, 2 Johns. Ch. 252; *Bostwick* v. *Atkins*, 3 Comst. 53, 60; 1 Parsons Cont. 75, 76 and cases in note; 1 Lead. Cas. in Eq. 167; *MacGregor* v. *Gardner*, 14 Iowa, 326, 335."

"As the principal or parties interested may confirm the sale, a mere stranger can not make the objection, that the trustee was the purchaser; or that the sale was irregular. The remedy belongs only 'to persons who had an interest in the property before the sale, and no other person can apply to set aside the sale.' *Hawley* v. *Cramer*, 4 Cow. 717, 744; *Edmunson* v. *Welsh*, 27 Ala. 578, 5 Id. 428; *Hannah* v. *Carrington*, 18 Ark. 85, 16 Ala. 581; *Greenleaf* v. *Queen*, 1 Peters, 138, 5 Barr. 97; *Wightman*, v. *Doe*, 24 Miss. 675."

In all these cases the purchaser himself came into a court of equity for relief, or for the confirmation of the voidable

sale. The fact that he appeared as complainant and not as a defendant, in no wise affected the application of the rule that such purchases can only be objected to by the *cestui que trust*.

The cases which were cited by counsel for defendants to sustain their plea in the court below, and which will doubtless be relied upon and urged in this court, do not, in our judgment, apply to the case at bar. In none of these cases was a purchase by a trustee of the trust property held void in the absence of actual fraud. All of them were cases in which fraud in fact was alleged and proved, or in which the law pronounced the contract or transaction absolutely void on other grounds. In none of them was any reference made to the numerous cases holding purchases by trustees voidable only, nor was any decision announcing that rule considered or overruled.

The following are the cases upon which counsel relied, below:

*Bartle* v. *Coleman*, 4 Peters, 184, was a case of gross actual fraud. Baldwin, J., delivering the opinion of the court said:

"The case then presented for the consideration of the Circuit Court, and now before us for revision, is this: A contract made by the complainant with a public agent, a deputy quartermaster-general, to an amount exceeding $50,000, in the profits of which he was to participate; false measures attempted to be imposed on the government; the fraud discovered by the vigilance of its accounting officers; and a bill in equity filed to compel an alleged partner to account for and pay to one of the parties in such a transaction, the one half of a loss sustained by an unsuccessful attempt to impose spurious vouchers on the government."

*Creaths' Administrator* v. *Sims*, 5 How. 192, was a bill to enjoin a judgment on the ground, amongst others, that the contract on which it was founded was prohibited by a statute. The court held the parties were *in pari delicto*, and complainant having failed to set up this defense at law, no rea-

son being given for the omission, he could not be relieved in equity.

*Randall* v. *Howard*, 2 Black. 585, was a bill to enforce a contract made to injure a third person, by fraudulently using the process and decrees of the court, and to restrain defendant from disposing of lands he had bought at a foreclosure sale, ratified by the court, under a decree entered by consent of complainant. This court held the agreement was absolutely void; that the bill was demurrable on its face under the Statute of Frauds; and that this court would not set aside or enjoin the enforcement of the decree entered by the State court which had jurisdiction of the parties and the subject-matter.

*Bolt* v. *Rogers*, 3 Paige Chy. 154, was decided upon the ground that the contract in question was absolutelly void because of actual fraud and illegality practiced by the executrix of an estate, in collusion with complainant, in presenting false and fraudulent accounts to the surrogate, and thus obtaining an order to sell real estate for the payment of debts, in fraud of the heirs, for the joint benefit of the executrix and complainant.

*Marshall* v. *B. & O. R. R. Co.*, 16 How. 153, was an action at law; and *Trist* v. *Child*, 21 Wall. 441, was a bill in equity, brought to enforce contracts for contingent fees for services in procuring and influencing legislation; *Tool Co.* v. *Norris*, 2 Wall. 45, was a suit at law brought on a contract for contingent fees for procuring a government contract. In each case the court held the contract absolutely void.

*Wheeler* v. *Sage*, 1 Wall. 518, was a bill to compel Sage to account to his co-partners for the proceeds of certain mortgaged property, which a third person had bought in, partly on Sage's account. It was dismissed on the ground, (1) that the transaction was outside the scope of the partnership business, and that the alleged contract to share the profits was not proven, hence Sage was not liable as a trustee; (2) that the profits were the result of a fraudulent scheme by which a foreclosure decree was taken for a much

larger amount than was due, by collusion, to the injury of other creditors. The proofs showed actual fraud, and the court held the transaction void.

*Brown* v. *Tarkington*, 3 Wall. 378, was a suit at law against defendants as stockholders of a bank in the Territory of Nebraska, to recover moneys advanced by plaintiff to redeem paper of the bank in circulation, and for a balance due. The bank began business in September, 1857, and ceased in May following, with an outstanding circulation of its bills of some $90,000.

The plaintiff was held not entitled to recover, on the ground that the charter and organization of the bank, and the banking bnsiness carried on, were all in violation of the express provisions of the act of Congress and were absolutely void, of all of which the plaintiff had actual knowledge.

*Selz* v. *Una*, 6 Wall. 327, was a bill to enforce, by injunction, against the *bona fide* assignees of a judgment, a secret agreement, of which they had no notice or knowledge, that if two of several defendants at law would abstain from participating in the defense, the judgment should not be collected from or enforced against them. The court held this operated as a fraud on the other defendants at law, and would not be enforced.

*Coppell* v. *Hall*, 7 Wall. 542, was a suit brought directly to enforce a contract, which the court pronounced absolutely void, as contrary to public policy, to the law of nations, to the act of Congress, to the proclamation of the president and to the regulations of the treasury department. The maxim *ex dolo malo*, etc., was applied.

Counsel for defendants below in their brief said that neither the case of *Drury* v. *Cross*, 7 Wall. 299, nor *Jackson* v. *Ludeling*, 21 Wall. 616, affords a parallel to this case. We agree they do not, because in both of those cases gross actual fraud was shown. In the case at bar it is neither alleged nor proven.

*Drury* v. *Cross*, *supra*, was a bill filed by judgment creditors of a railroad company, to set aside a fraudulent foreclos-

ure sale, far below value, of the railroad line, franchises, rolling stock, etc. (including the locomotives, for the price of which the judgment was obtained.) The sale was made under an agreement between the directors of the road and the purchasers, by which, the directors escaped liability on indorsements they had made for the company. In furtherance of this scheme some $280,000 of bonds of the company were fraudulently issued, and used by the purchasers in paying for the property at the foreclosure sale.

*Jackson* v. *Ludeling*, 21 Wall. 616, was a bill filed by the holders of 660 out of 761 mortgage bonds, of $1,000 each, issued by a railroad company, to set aside a fraudulent sale of the railroad property and several hundred thousand acres of land, which had been made on an *ex parte* order, at the suit of the holder of only $4,000 of bonds, on which only $720 of interest was due. The sale was held in a village far in the interior of Louisiana, without notice to the great majority of the bondholders, who resided in distant States. Onerous and illegal conditions of sale were exacted from other bidders, but not from these purchasers, who paid nothing except to themselves. A property upon which had been expended nearly $2,000,000, with the land grant, etc., was bought for $50,000 by the very persons who defeated a sale for a much larger price, and the purchase money was retained by themselves. Among the purchasers were seven of the directors of the company. This court found there was gross actual fraud, and decided the case upon that ground.

The whole effort of counsel for defendants below was to take the case at bar out of the line of authorities which hold a purchase by a trustee voidable only, and to bring it within the line of cases cited by them, where the contract or transaction has been held absolutely void for actual fraud. In the case at bar there is neither allegation nor proof of actual fraud; hence we contend the purchase in this case falls strictly within the general rule as to purchases by trustees, and, since the defendants can not attack it on that ground, it is unassailable.

V.

EVEN THOUGH THE ORIGINAL AGREEMENT WERE INVALID AS CONTRARY TO PUBLIC POLICY, STILL, HAVING BEEN COMPLETELY CARRIED OUT AND EXECUTED, DEFENDANTS WILL NOT BE PERMITTED TO DEFRAUD THE COMPLAINANT OF THE PROFITS IN THEIR HANDS BY RAISING THIS OBJECTION.

The agreement which is alleged to have been contrary to public policy by reason of complainant's interest in it, consisted solely in the purchase of the bonds and their use in acquiring the mortgaged property.

This contract was completely executed and carried out when the bonds had been purchased, the most of them under an agreement with the holders, which was approved by and referred to in the orders of the court, and when these bonds had been turned in in payment for the railroad lines, etc., as provided for in the foreclosure decrees. The decrees were entered in March and April, 1879, the sales were made in May and June, 1879, and were confirmed by the court; (Rec. p. 32), and all of the lines of railroad and mortgaged property were purchased by, and turned over to the defendant, the St. Paul, Minneapolis & Manitoba Railway Company, which now holds the same in trust for all the parties interested in such purchase, including complainant.

This bill is filed, not to enforce the original agreement, not to compel Kittson and Hill to go on and purchase the bonds, or to raise the necessary funds for that purpose, or to use the bonds in paying for the railroads; nor is it brought to compel the bondholders to perform their agreement to sell the bonds on the terms stipulated. All this has been accomplished and performed, and this bill is filed, after the original contract has been fully completed, for an accounting, the enforcement of a trust, to compel the turning over to complainant of his property now in the possession of the Manitoba Company.

*McBlair* v. *Gibbs*, 17 How. 232, was a bill filed by the personal representatives of Goodwin, to recover against the

executors of Oliver, possession of a fund which arose from Goodwin's interest in a claim against Mexico, under a contract with General Mina for advances and supplies, in fitting out a military expedition against the dominions of the King of Spain. The defense was an assignment by Goodwin to Oliver in 1829. It was replied that the contract with General Mina being illegal, the assignment was also illegal, and no interest, equitable or legal, passed to Oliver's executors.

This court, after holding that the original contract was illegal and invalid and incapable of being enforced in a court of justice, said:

"But if the party who might set up the illegality chooses to waive it and pay the money, he can not afterward reclaim it. And if even the money be paid to a third person, for the other party, such third person can not set up the illegality of the contract on which the payment has been made, and withhold it for himself. In *Faikney* v. *Reynous*, 4 Burr. 2,069, where two persons were jointly concerned in an illegal stock-jobbing business with a third, and a loss having arisen, one of them paid the whole and took a security from the other for his share; the security was held to be valid as a new contract, uninfected by the original transaction. And in *Petrie* v. *Hannay*, 3 T. R. 418, where one of the partners, under similar circumstances, paid the whole at the instance of the other, he was allowed to recover for the proportionate share. These cases are examined and approved in *Armstrong* v. *Toler*, 11 Wh. 258.

"In *Tenant* v. *Elliot*, 1 B. and P. 3, the defendant, a broker, effected an insurance for the plaintiff, which was illegal, being in violation of the navigation laws; but on a loss happening, the underwriters paid the money to the broker, who refused to pay it over to the insured, setting up the illegality, upon which an action for money had and received was brought. The plaintiff recovered on the ground that the implied promise of the defendant, arising out of the receipt of the money for the plaintiff, was a new contract not affected by the illegality of the original transaction.

The same principle was applied and enforced in the case of *Farmer* v. *Russell*, 1 B. and P. 296." The court also cited with approbation, *Sharp* v. *Taylor*, 2 Ph. Ch. R. 801, and *Thompson* v. *Thompson*, 7 Ves. 470.

*Brooks* v. *Martin*, 2 Wallace, 70, was a bill in equity filed by Martin to set aside, on the ground of fraud, a contract of sale he had made to Brooks of his interest in a partnership venture, for an account and division of the profits. The defense was that the business of the partnership, from which the profits resulted, was the buying of *claims* for bounty land and scrip, long before any scrip or land warrants were issued by the government; which was an illegal traffic, forbidden by act of Congress of February, 1847, and against public policy. The ninth section of the act provided that any sale or contract going to affect the title or claim to any such bounty made *prior* to the issue of such warrant, should be "*null and void to all intents and purposes whatsoever.*" That, accordingly, the plaintiff could have no relief in a court of equity against his co-partner, even if it were made to appear that the latter realized a large sum out of the venture, and defrauded the former of his share of the amount so realized.

The court said:—"We think that, in point of fact, the allegation of the answer—that the traffic in which this firm engaged was the buying up of soldiers' *claims*, before any scrip or land warrants were issued, and not the purchase and sale of bounty land warrants and scrip,—is true. We have as little doubt that the traffic was illegal. Undoubtedly, the main object of the act of February 11, 1847, was to protect the soldier from improvident contracts of the precise character of those developed in this record. It was a wise and humane policy, and no court could hesitate to enforce it, in a case which called for its application. If a soldier, who had thus sold his claim to Brooks, Field & Co., had refused to perform his contract or to do any act which was necessary to give them the full benefit of their purchase, no court would have compelled him to do it, or given them any relief against him, and if they had, by any such means,

got possession of the land warrant or scrip of a soldier, no court would have refused, in a proper suit, to compel them to deliver up such land warrant or scrip to the soldier. Or if Brooks, after the signing of these articles of partnership, had said to Martin, "I refuse to proceed with this partnership, because the purpose of it is illegal," Martin would have been entirely without remedy. If, on the other hand, he had said to Martin, "I have bought one hundred soldiers' claims, for which I have agreed to pay a certain sum which I require you to advance according to your agreement," Martin might have refused to comply with such a demand, and no court would have given either of his partners any remedy for such a refusal. To this extent go the cases of *Russell* v. *Wheeler*, 17 Mass., 281, *Sheffner* v. *Gordon*, 12 East, 304, *Belding* v. *Pitkin*, 2 Caines, 149, and others cited by counsel for appellant, and no further.

"All the cases here supposed, however, differ materially from the one now before us. When the bill in the present case was filed, all the claims of soldiers thus illegally purchased by the partnership, with money advanced by complainant, had been converted into land warrants, and all the warrants had been sold or located. The original defect in the purchase had, in many cases, been cured by the assignment of the warrant by the soldier after its issue. A large proportion of the lands so located had also been sold, and the money paid for some of it, and notes and mortgages given for the remainder. There were then in the hands of defendant, lands, money, notes and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced. It is to have an account of these funds, and a division of these proceeds, that this bill is filed. Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of all these funds, to refuse to do equity to his other partners because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute, enacted for the benefit of the soldier, is to be rendered any more effective by leaving all this in the hands of Brooks,

instead of requiring him to execute justice as between himself and his partner; or what rule of public morals will be weakened by compelling him to do so? The title to the lands is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become accomplished facts, and can not be affected by any action of the court in this case.

"In *Sharp* v. *Taylor*, 2 Phillips Ch. 801, a case in the English chancery, the plaintiff and defendant were partners in a vessel, which, being American built, could not be registered in Great Britain, according to the navigation laws of that kingdom. Nor could the owners, who were British subjects, residing in England, have her registered in the United States. They undertook to violate the laws of both countries, by having her falsely registered in Charleston, South Carolina, as owned by a citizen and resident of that place. In this condition she made several trips, which were profitable, and the defendant, colluding with Robertson, the American agent in whose name the vessel had been registered, refused to account with plaintiff for his share of the profits, or acknowledge his interest in the ship. When plaintiff brought his suit in chancery in England, the defendant set up the illegality of the traffic, and the violation of the navigation laws of both governments, as precluding the courts from granting any relief, on the same principle that is contended for by the defendant in the present case. It will be at once perceived that the principle is the same in both cases, and that the analogy in the facts is so close that any rule on the subject which should govern the one ought also to control the other. The case was decided by Lord Chancellor Cottenham, and from his opinion we make the following extracts: 'The answer to the objection appears to me to be this,—that the plaintiff does not ask to enforce any agreement adverse to the provisions of the act of Parliament. He is not seeking compensation and payment for an illegal voyage. That matter was disposed of when Taylor (the defendant) received

the money: and plaintiff is now only seeking payment for his share of the realized profits. * * * As between these two, can this supposed evasion of the law be set up as a defense by one, against the otherwise clear title of the other? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that, in realizing it, some provision or some act of Parliament has been violated or neglected? * * * The answer to this, as to the former case, will be, that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do between the parties. * * * The difference between enforcing illegal contracts, and asserting title to money which has arisen from them, is distinctly taken in *Tenant* v. *Elliot*, and *Farmer* v. *Russell*, and recognized and approved by Sir William Grant in *Thomson* v. *Thomson*, 7 Vesey 470.'

"These cases are all reviewed in the opinion of this court in the case of *McBlair* v. *Gibbes*, and the language here quoted from the principal case is there referred to with approbation. We are quite satisfied that the doctrine thus announced is sound, and that it is directly applicable to the case before us."

In *Planters' Bank* v. *Union Bank*, 16 Wall. 499, the court said: "Nor should the court have charged that, in the circumstances of this case, no action would lie for the proceeds of the sales of Confederate bonds which had been sent by the plaintiffs to the defendants for sale, and which had been sold by them, though the proceeds had been carried to the credit of the plaintiffs and made a part of the accounts. It may be that no action would lie against a purchaser of the bonds, or against the defendants on any engagement made by them to sell. Such a contract would have been illegal. But when the illegal transaction has been consummated; when no court has been called upon to give aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value, and when they have been carried to the credit of the

plaintiffs, the case is different. The court is not there asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them. Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin. Thus, in *Faikney* v. *Reynous*, 4 Burrow, 2069, a plaintiff was allowed to recover in an action on a bond given by a partner to his copartner for differences paid in a stock-jobbing transaction prohibited by act of Parliament. This was the case of an express agreement to pay a debt which could not have been recovered of the firm. *Petrie* v. *Hannay*, 3 T. R. 419, was a similar case, except that the partner plaintiff had paid the differences by a bill on which there had been a recovery against him, and his action against his copartner for contribution was sustained. This was an action on an implied promise. *Ex parte Bulmer*, 13 Vesey, 316, goes much farther, and perhaps farther than can now be sustained. We are aware that *Faikney* v. *Reynous* and *Petrie* v. *Hannay* have been doubted, if not overruled, in England, but the doctrine they assert has been approved by this court. *Armstrong* v. *Toler*, 11 Wheat. 258; *McBlair* v. *Gibbes*, 17 Howard, 236; *Brooks* v. *Martin*, 2 Wallace, 70. *Lestapies* v. *Ingraham*, 5 Barr, 71, is full to the same effect. We think, therefore, the court was not in error in refusing to affirm the defendants' points."

In the case of *Miltenberger* v. *Cooke*, 18 Wallace, 421, it appeared the act of Congress of August 6, 1846, provided that all duties, taxes, etc., accruing or becoming due to the United States, should be paid in gold or silver coin only, or in treasury notes. Cooke, Collector of Internal Revenue, for reasons satisfactory to him, received from Caruthers & Co., in payment of the tax on cotton shipped by them,

drafts on Miltenberger & Co. which they had promised by letter to honor. The bales of cotton were marked in the way the act of July 13, 1866 required, when the taxes were paid. Cooke reported the taxes as paid and so charged himself, and was so charged by the treasury department.

Cooke brought suit on these drafts, and Miltenberger & Co., *inter alia*, pleaded that the laws of the United States did not authorize the collectors of revenue to take or accept drafts for the payment of taxes, or any other thing, except the lawful money of the United States; but, on the contrary, particularly and explicitly prohibited the mode of collection set forth and described in the petition of the plaintiff, and that what had been done was a violation of the acts of Congress in this behalf.

The court, after holding that as between the parties the tax was paid by Cooke for Caruthers & Co., said:

"Conceding that the transaction was illegal, the statutory provisions relied upon by the plaintiffs in error are for the protection and benefit af the United States, and it was for the latter to object or not as they deemed proper. In this view of the case, they could have repudiated the transaction and called upon Caruthers & Co. for payment. With full knowledge of the facts they chose not to do so. The matter was one between them and their agent. The option to object belonged to the government and can not be exercised by those who have not and could not have been injured."

In *Fackler* v. *Ford*, 24 How. 323, the court held that one who covenants to sell lands which he expects to purchase at public sales of the United States, can not afterward plead his own fraud in obtaining his title from the government, in bar of a decree for specific performance of his agreement.

In *Harris* v. *Runnels*, 12 How. 79, suit was brought on a promissory note. The defendant pleaded that the note was given for an illegal consideration, for slaves which had been bought and sold in violation of the State statute. The plaintiff demurred, admitting the truth of the plea. The question arose between the parties to the transaction, buyer

and seller. This court overruled the objection of the illegality of the contract, on the ground that the statute did not make the transaction absolutely void, and refused to countenance the fraud of the purchaser in attempting to evade the payment of the note on this plea. The maxim *In pari delicto*, etc., was considered, but it was held that the grounds of public policy on which it was founded did not call for its application to such a case.

In *Railroad Co.* v. *Durant*, 95 U. S. 576, the company filed its bill against Durant to compel a conveyance of certain lands and lots which had been conveyed to him as trustee in consideration of the location of the eastern terminus of the railroad at Omaha, within one and a quarter miles of Farnham street, thence running west from said point to the Platte valley. The substance of the answer was that the sole consideration of the conveyances to Durant was the location of the eastern terminus as aforesaid, and the approval of the route westward by the president, in whom alone was vested the power to locate said terminus and route; that the company did not fix the location of said terminus or route, but the surveys therefor were made at defendant's expense, under his direction; and that the proposed donation was intended to be made to him individually, in order to secure his influence with the president and company in establishing said terminus and route.

The court below dismissed the bill on the ground, as to most of the property, that the proposal pursuant to which the conveyances were executed to defendant, was secured by an illegal and oppressive exercise of his power as acting president and active manager of the company, and that he held the property as trustee for the donors, except as to certain lands which it was admitted, he had received as trustee for the company.

This court, after holding defendant was trustee for the company, and not for the grantors in the conveyances, said:

"But it is said the conveyances grew out of an illegal transaction between the company and the grantors.

To this there are several answers. The grantors have voluntarily executed the contract. They have not intervened and do not complain.

"The conveyances to the trustee were, in the view of the law, the same as if they had been to the company. The transaction between the parties in interest was thus finally closed. There will be neither more nor less of illegality between the original parties, whether the trustee does or does not respond to his obligation to the company. In that obligation there is no pretense for saying there is any taint of any kind, and it is that obligation alone which it is sought to enforce by this proceeding." * * *

"The appellee can not claim adversely to those for whom he acquired and holds the property. The rights of others, if such rights exist, do not concern him. He can not vicariously assert them." * * *

"The position assumed by the trustee in this case is not unlike that of one who, having deprived the owner of the possession of his property, when called to account civilly or criminally, should insist that the owner's title was fatally tainted with fraud, and that hence the offender had the right to 'take and carry away,' and keep and enjoy the property himself with impunity." The decree below was reversed.

We regret that we have been obliged to trespass at some length upon the indulgence of the court; but the positions assumed by the defendants, and by the learned court below, the importance of the questions involved, and the magnitude of the interests at stake, seemed to render it necessary. In the presentation of the facts, we have endeavored to be guided solely by the record; and we submit that the propositions of law upon which we rely are too well established to admit of controversy.

The question presented here for the determination of the court is whether, by reason of the fiduciary relations of complainant, in the absence of either allegation or proof of actual fraud, in the absence of complaint by any of the persons interested in the property, as creditors, stockholders,

or bondholders; on the mere suggestion of the defendants who do not stand in the relation of *cestuis que trust*, and who raise the objection solely for the purpose of shielding themselves in an attempt to perpetrate an actual fraud upon complainant, the court will pronounce this entire purchase not voidable, but utterly void.

To so hold would, in our judgment, unsettle and overturn limitations and qualifications of the general rule, which are as well settled and as firmly established as the rule itself; which are in fact essential and integral elements of the general rule; and this in the interest of parties who present not a single equitable claim to the consideration of the court.

We submit that the position assumed by defendants in this case is not only in violation of the dictates of natural justice as between man and man, but it is subversive of wise and salutary rules and principles of law, sanctioned by innumerable authorities, and deeply ingrafted in our jurisprudence.

Respectfully submitted,

HENRY D. BEAM,
EDWARD D. COOKE,
*Solicitors for Appellant.*

GEORGE F. EDMUNDS,
*of Counsel.*

120-353

Supreme Court, U.S.
FILED
NOV 30 1886
JAMES H. MCKENNEY

# Supreme Court of the United States.

**October Term 1886.**

JESSE P. FARLEY, APPELLANT,

*vs.*

KITTSON AND OTHERS, APPELLEES.

***Points Submitted by Mr. Edmunds, of Counsel for Appellant, on the Reargument of the Cause.***

The state of the question on the record is thus:

**I.**

The amended bill (Rec., p. 19) states an agreement for acquiring by purchase or contract, on joint account, bonds—

(A) First Division St. Paul and Pacific Railroad.

(B) Bonds of the St. Paul and Pacific Railroad in Minnesota.

These bonds were at the time of the agreement—1876—"outstanding and for sale by the holders thereof at a large discount," and were secured by mortgages on the two properties. The bill states (p. 19) that the purpose of this agreement was, that if the property should be foreclosed and sold, to use the bonds in payment thereof and so to purchase the property at judicial sale. The bill alleges (p. 19) that the appellant, as one of the persons interested in purchasing the bonds, was "to furnish such facts, information, and advice, and render such aid and assistance

therein from time to time as should be required of him." That he "had knowledge not possessed by any other parties as to the whereabouts and situation of said bonds and the rated value thereof by the holders, the mode whereby and the channel through which the same could be reached and procured," and also in respect to the situation, &c., of the property.

**2.**

The bill alleges that pursuant to this arrangement an amount of bonds was purchased in the name of Smith *et al.* for the purpose stated, and that the appellant performed his part of the undertaking by giving facts, information, etc.

**3.**

The bill alleges (p. 20) that the purchases of the bonds were made on the terms that upon the decrees of foreclosure being rendered the sellers should have the option of coming in with the purchasers under the foreclosure sale and taking a new mortgage and new bonds, or receiving cash at the agreed price.

**4.**

The bill alleges (p. 21) that nearly all of said bonds were held in Holland, and that Kennedy was agent of the bondholders and their manager in respect thereto, with full powers, and that he was a trustee in all the mortgages and plaintiff in all the foreclosure suits excepting one, and that the suits were under his control and direction.

**5.**

The bill alleges (p. 21) that the appellant was receiver of the St. Paul and Pacific, and manager of the First Division Company.

**6.**

The bill alleges (p. 21) that before the decree of foreclosure and before the purchase of the bonds and pending negotiations thereof, the plaintiff informed Kennedy of his interest in the purchase of the bonds and his connection with Kittson and the others in the project, and that Kennedy "fully approved and sanctioned the same;" and that the negotiations in respect of the purchase of the bonds "were mainly had and conducted by said Kennedy on behalf of said bondholders and as their agent in the premises, and said bonds, when so purchased, were placed in the hands of said Kennedy" to be held until the completion of the arrangements, and either exchanged for new bonds or paid for in cash, as he and his principals should determine.

**7.**

The bill alleges (p. 22) "that to all inquiries made by said Kennedy, or any of the trustees in said mortgages, or by any of the holders of any of the bonds secured thereby, or by any one interested in the property under his charge as manager or receiver, he had at all times given full and taue answers and information to the best and utmost of his knowledge and ability, and kept the said Kennedy fully informed of all facts, matters, and things coming to his knowledge affecting said property, and in all things acted honestly and in good faith toward all persons interested in the property under his control as receiver and manager as aforesaid."

**8.**

The bill then states (pp. 22, 23, *et seq.*) the completion of the foreclosure of the mortgages, the sale, the purchase by the defendants, and the complete execution of the whole affair, leaving nothing to be done in further execution of the joint agreement, so far as dealing with the

property under the mortgages was concerned, and leaving the various parties in interest entitled to their respective rights, according to the arrangement under which the bonds had been purchased.

**9.**

The bill then states (pp. 24, 25) that the defendants refused to recognize the appellant as having any interest in the bonds or the property purchased with them, and prays for the proper relief.

After sundry demurrers, &c., the final and only issue in the court below was on the plea in bar (p. 29) of Kitson & Hill, finally joined in by the new corporation (p. 35), alleging—

(A) Substantially the same history of the mortgages, or some of them, and their foreclosures, the position of Farley as receiver of one road and his employment as manager of the other, and the trusteeship of Kennedy; and

(B) "That the said plaintiff never at any time informed the said Kennedy, nor any of the holders of any of said mortgage bonds, of his interest in the project of purchasing said bonds, or of his interest in the project of acquiring, by means of said bonds, the said mortgaged property which he alleges in his bill of complaint; nor did the said Kennedy nor any of said bondholders know, suspect, or have any information or belief at any time until after the confirmation of all said foreclosure sales, that the plaintiff ever claimed to have any such interest, or any interest in said projects, or either of them."

This last allegation was the sole averment of fact inconsistent with the allegations of the bill.

To this plea there was the usual replication of traverse (p. 33).

It will thus be seen that the respondents, without any answer, either in general or in support of the plea, put themselves solely upon the defense that the appellant did

not communicate the facts of his interest in the purchase of the bonds to the holders of the same, through their agent and trustee (Kennedy), and that the sole question of fact presented for trial to the court below was that one.

Suggesting to the court the question, first, whether this was a case for a plea at all, and secondly, whether an answer should not have been put in to the other statements of the bill, it is submitted:

## I.

That the plea admits all the allegations in the bill, not traversed, to be true. (Story's Equity Pleading, Sec. 694.)

## II.

That the only question open in the court below on the plea was that question of fact; and if the proof showed the disputed allegation of the bill to be true, the plea should have been overruled and the question of the general right of the orator to relief should have been tried upon answer and proofs of the whole circumstances of the affair. (Story's Equity Pleading, sec. 697.) This rule in respect of pleas is rigid and imperative in respect of negative pleas like this, so that which ever way the fact in dispute is determined, there is a complete disposition of the plea, and if the plea is sustained in point of fact, there is a decree against the orator, no matter whether the plea would have been good in point of substance or not; and if the plea is not sustained in point of fact, there must be a decree against it, either final or requiring an answer as the case may be. (Story's Equity Pleadings, sec. 697.)

There was no occasion or right, therefore, for the court below to go into a consideration of the general question of the right of the orator upon the circumstances stated in the bill. And there was still less right to consider the evidence taken upon the issue made on the plea as having any bear-

ing upon the general rights of the parties other than as touching the precise question of fact, viz., the knowledge and acquiescence of Kennedy in the orator's being concerned in the purchase of the bonds. The evidence proves without contradiction that Kennedy did have such knowledge and did so acquiesce, (p. 40–41 *et seq.*,) and the statements of Farley that the fact of his interest in the purchase of the bonds was not known to or was kept secret from other persons having, as he supposed, adverse interests to those of the bondholders, had no relation to the issue pending between the litigants. The decree of the court below dismissing the bill was, therefore, manifestly erroneous whatever may be the final conclusion of that court or this when, upon demurrer or answer, the case shall be heard upon all its merits and on all its points.

## III.

The additional brief of my associates is so complete upon the general merits of the case that really nothing needs to be added; but I submit the following:

### 1.

From what has preceded it will be seen that the defense admits the honest motives and purposes of the orator, and that his conduct in every respect as regards the management of the property, and as regards the giving of full, true, and complete information to all persons applying for it, was beyond reproach. The question is thus reduced to one entirely apart from any suggestion of actual fraud or misconduct on any account, and to the one only matter of the attitude of the orator as receiver of one road, and as the employed manager of the other alleged by the defense to debar him from the right of purchasing, or being interested in the purchase of the bonds of the two companies, and thereby, as is alleged, relieving the defendants

from the obligation of their agreement to recognize him as a part owner of the bonds, and so as a part owner in the property acquired at the sale.

This, it is confidently submitted, is the simple and sole question on the merits now before the court.

It will be observed that this question is not one between the appellant and the bondholders, whose agent knew of the arrangement and approved it (and which undoubtedly secured to the bondholders a larger price than they otherwise could have got for their bonds); nor even a question between the appellant and stockholders or creditors of the corporation, or any other person having any interest in the property before its final judicial sale and purchase by the defendants. It is solely a question whether the defendants, having so obtained the property, can repudiate the joint interest of the appellant in the purchase upon the ground that his conduct, in point of law, was inconsistent with his position as receiver of one road and manager of the other. The bondholders were satisfied with his conduct. The stockholders have made no complaint. The conduct of the appellant was, in fact, honest and true. The defendants, therefore, can not deny the right of the plaintiff to his share in the new property upon the mere ground (and that is all that is alleged in the pleadings) that his concern in the purchase of the bonds was a breach of trust towards his constituents, who were and are satisfied, and whom the defendants do not pretend to be, and making no allegation that the original arrangement, or its execution, was intended to cheat or mislead any person or to obtain any undue advantage, or that Farley concealed or misrepresented any fact or circumstance concerning the value or operations of the property.

It is believed that there is no reported case that comes anywhere near to upholding such a defense.

The line of distinction is everywhere defined as broadly as it may be between cases of corrupt combinations to cheat

or defraud beneficiaries or others, and the cases where the alleged breach of trust arises simply from the mere fact of the relation of the parties to the subject in question. In the first class of cases the courts properly hold that they will not be the instruments of compelling divisions of the spoils of robbery or fraud. In the second class of cases they hold that no one has a right to call in question such a breach of trust, unless he was injured by it. The last class embraces this one.

Respectfully submitted,

GEO. F. EDMUNDS,
*Of Counsel for Appellant.*

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1886.

*No.*.....

JESSE P. FARLEY, *Appellant*,

*vs.*

NORMAN W. KITTSON, JAMES J. HILL, AND THE ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY.

*Appeal from the Circuit Court of the United States for the District of Minnesota.*

## ADDITIONAL BRIEF FOR APPELLANT.

HENRY D. BEAM,
EDWARD D. COOKE,
*Appellant's Solicitors*

GEORGE F. EDMUNDS,
*Of Counsel.*

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*Appeal from the Circuit Court of the United States for the District of Minnesota.*

## ADDITIONAL BRIEF FOR APPELLANT.

MAY IT PLEASE THE COURT:

A re-argument of this cause having been ordered, we respectfully submit this additional brief, not as a substitute for the original brief filed by us, but as a short discussion of the points raised and authorities cited in oral argument by counsel for appellees. Before considering these authorities, however, we beg to invite the attention of the court to some of the facts stated in the original brief, and not denied, but either expressly or tacitly admitted on the hearing, and to some of the propositions of law applicable thereto, which we submit are too well supported, both upon principle and authority, to be assailed.

I.

1. There is neither averment nor proof in the record of any fraud in the means employed to purchase the bonds, or in their use in payment for the property at the foreclosure sales.

It does not appear that anything was done or left undone by complainant, or by Smith, Stevens, Kittson or Hill, by which the bonds or the mortgaged property were depreciated in value, or that any form of circumvention, deceit, lying or false representation was used as to the intrinsic, market or prospective value of the bonds or railroad lines, or as to the prospects and probable future of the property, or as to the difficulty, time, expense or hazard of completing the extension lines, securing the land grant, or foreclosing the mortgages; nor that any fraudulent means were used to induce the bondholders to sell their bonds, or to sell them at less than their value, or in procuring the signatures to the option agreement under which the bonds were sold, nor that the bonds were obtained without payment of the agreed price or complying with the terms of the agreement.

2. The scheme of re-organization adopted in the purchase of the bonds and their application in payment for the mortgaged property at the foreclosure sales, was known to, and approved by the bondholders, their trustees and representatives, and the court, and such use of the bonds was expressly authorized by the foreclosure decrees.

3. Under the order of the court of May 31, 1878, the bonds purchased were held in *escrow* by trustees, agreed upon by the Dutch committee representing the bondholders, until the final carrying out of the agreement. And, under the agreement the sellers of the bonds were given the option, after the re-organization had been effected, to take the bonds of the new company, or to demand cash at the agreed price.

4. After the purchase of the bonds, the purchasers raised and advanced several millions of dollars and built the Ex-

tension Lines, under the order and approval of the court, thereby saving the land grant from forfeiture: and by the terms of the order any bondholder was accorded the right, at any time before the foreclosure sales, to pay his *pro rata* share of this expense and thereby place himself in equal right and interest with the purchasers.

5. No creditor, stockholder or bondholder of the St. Paul Company or the First Division Company has ever complained of any fraud, wrong or injustice done him in any of these transactions.

Among the facts more particularly relating to the appellant, Farley, and his interest in this purchase, are the following:

1. The bill upon which Farley was appointed receiver of the property of the St. Paul Company was not a foreclosure bill. It was filed primarily too procure the appointment of a receiver to construct the Extension Lines and secure the land grant.

2. The railroad lines and mortgaged property were sold at public auction, by the proper officer of the court, under foreclosure decrees entered in five several suits brought for that purpose. There is no pretense that Farley ever had power to sell or did sell any of the property. He did not, therefore, purchase at his own sale.

3. There is no evidence or pretense that Farley bought the property at the foreclosure sales, or that he was present or made any bid.

4. No actual fraud of any sort is alleged against him.

The objection raised on the record by appellees is, that Farley had an interest in the bonds which were purchased and used in payment for the roads, and that, by reason of the fiduciary capacity in which he had acted, he was incapable of taking such interest, and could not maintain this bill.

In our original brief we cited a large number of authorities to show that in the absence of actual fraud a purchase by a trustee, or any one standing in fiduciary relation, of the trust property, was voidable only, and not void; and

voidable only at the election of the beneficiaries of the trust and not by third parties, and that this rule applies equally to purchases by trustees generally, by executors and administrators, by directors of corporations and joint stock companies, by guardians, attorneys, sheriffs, commissioners in chancery with power to sell, assignees in bankruptcy and their solicitors, and receivers appointed by the court. And our contention was, and is, that the case at bar, no actual fraud, or moral turpitude being either alleged or proved, falls strictly within the rule laid down in this line of cases, and not within the line of cases cited by appellees, in all of which gross actual fraud and moral turpitude were shown.

In the case at bar, the sole objection raised on the record is that of constructive fraud, inferred in law from the fiduciary relations of complainant, and nothing has been advanced to show wherein his position in any respect differs from that of any other of the classes of fiduciary agents above referred to, or why any different rule should be applied.

## II.

In support of the assertion that complainant could not lawfully be interested in the purchase of these bonds, counsel for appellees in their brief (p. 19) cite *Ashuelot R. R. Co.* v. *Elliott*, 57 N. H. 397; 2 Perry on Trusts, Sec. 749, and Jones on R. R. Securities, Sec. 360. The latter is based entirely upon and consists of quotations from *Ashuelot R. R. Co.* v. *Elliott*. In the latter case the court cites only Perry on Trusts, Sec. 749, and Perry cites no authority on the point; so that the sole authority is the case in 57 N. H. 397.

That was a bill brought by the corporation and several stockholders against Elliott (et al.), who had taken possession of the railroad as trustee for the mortgage bondholders. The bill was for accounting and to redeem.

Elliott had been clerk and treasurer of the railroad company for twenty years, and was also trustee in the mortgage.

When he took possession it was supposed that an act of the legislature had had the effect of foreclosing the mortgage; but after several years the court, in 52 N. H. 387, between the same parties, held the statute had no such effect, and that Elliott was in possession as trustee. As to the right of Elliott while trustee in possession to buy the bonds, the court say:

"We need not now deny his right, so far as regards the other bondholders, to buy the bonds fairly in open market, taking no advantage of his posi ion and the knowledge gained therefrom, to overreach the seller; although a court of equity would undoubtedly scrutinize such a transaction pretty carefully, even when the purchase is made before the active duty of the trustee begins, and no interests are involved but those of the bondholders. Mr. Perry says as much: 'Doubtless they can purchase the bonds for which the mortgage stands as security, in open market; but they could not go among the bondholders and solicit the purchase of the bonds, for, holding the security for the bonds, their position and influence would be such, and the danger of fraud so great, that a court of equity would not allow the bargain to stand.' (Perry on Trusts, Sec. 749.)"

Perry adds: "Their duty would be governed by the general rules that affect all trustees, modified to meet the exigencies of the case."

In the case at bar, the complainant did not go among the bondholders and solicit the purchase of the bonds. The bonds were sold openly and publicly under a written agreement entered into by a committee representing the bondholders, approved by their representatives in America, and known to and sanctioned by the court. The fact that Farley was interested in the purchase exercised no influence upon the price of the bonds, and in no way affected or influenced the action of the bondholders. Under the rule as above stated, Farley had a right to purchase the bonds, and the authorities cited by appellees on this point are in harmony with the cases cited on pp. 50–52 of our original brief.

In some of the States the courts go much further in sustaining the right of the trustee to purchase, where no actual fraud is shown. (See cases cited in our original brief, pp. 47, 48).

In a late case in Pennsylvania the Supreme Court said: "It has been the conceded law of this State, since the case of *Fisk* v. *Sarber*, 6 W. & S. 18, that at a judicial sale, not controlled by the trustee, the trustee can be a purchaser."

Lusk's Appeal, 108 Pa. St. 159.

On the oral argument, *Munro* v. *Allaire*, 2 Caine's Cases, 184, was urged as strongly against complainant's right to recover. In that case the court decided that a bill in chancery by an executor, for specific performance of a purchase by him of the trust property, could not be sustained. But there the *cestuis que trust* were defendants resisting the bill. In the case at bar the bondholders, stockholders and creditors, who alone stand in the relation of *cestuis que trust*, have acquiesced in the purchase, and are not parties to the suit.

## III.

In our original brief, and on the oral argument, we maintained, upon the numerous authorities cited, that the fact that complainant, while receiver, was interested in the purchase of the bonds, and in the re-organization of the railroad companies, did not render his contract, *ipso facto*, fraudulent, illegal or void; that at most it could only be held voidable by creditors, stockholders or bondholders.

We also insisted, as we now insist, that under the rule laid down in *Brooks* v. *Martin*, 2 Wallace, 70, and other cases cited, the defendants were estopped to allege, as a defense to this bill, that the original contract of purchase was invalid. The contract which is alleged to have been invalid by reason of complainant's interest in it, has been completely carried out and executed by the purchase of the bonds and through them of the railroad lines at the foreclosure sales. The sales have been made and confirmed by the court. The property has

been turned over to the purchaser, the St. Paul, Minneapolis and Manitoba Railway Company, defendant herein, in trust for the owners of the bonds, including the complainant Farley; and this bill is brought to enforce that trust and for an accounting concerning the same. In what respect does it differ in principle from the case of *Tennant* v. *Elliot*, 1 B. & P. 3, in which the plaintiff recovered on the ground that the implied promise of the defendant, arising out of the receipt of the money for the plaintiff, was a new contract not affected by the illegality of the original transaction? This case was cited and approved in *McBlair* v. *Gibbs*, 17 How. 232, and in *Brooks* v. *Martin*, 2 Wall 70, which were expressly affirmed in *Planter's Bank* v. *Union Bank*, 16 Wall. 499.

The position taken by counsel for appellees in their brief, and the authorities cited by them in oral argument, were not so much directed to distinguishing the case at bar from that of *Brooks* v. *Martin*, but were rather in the nature of a direct effort to overturn the authority of *Brooks* v. *Martin*.

We had not considered, and do not now consider it necessary for us to attempt to bolster up the case of *Brooks* v. *Martin*. We not only believe the decision in that case to be founded upon unassailable grounds in law, but that, as between the parties to that suit, any other conclusion would have been contrary to justice and equity. And though subsequent decisions in England may have tended to unsettle some of the authorities referred to in *Brooks* v. *Martin*, yet that case has been followed and affirmed by a line of decisions in this court: *Planter's Bank* v. *Union Bank*, 16 Wall 499, and other cases cited in our original brief. In *Planter's Bank* v. *Union Bank*, *supra*, the court after reviewing the English authorities said: "We are aware that *Faikney* v. *Reynous*, and *Petrie* v. *Hannay*, have been doubted, if not overruled, in England, but the doctrine they assert has been approved by this court. *Armstrong* v. *Toler*, 11 Wheat. 258; *McBlair* v. *Gibbs*, 17 Howard, 236, *Brooks*, v. *Martin*, 2 Wallace, 70; *Lestapies* v. *Ingraham*, 5 Barr 71, is full to the same effect."

The alleged case of *Everett* v. *Williams*, mainly relied upon by appellee's counsel in his brief and oral argument, not only lacks authenticity, but also lacks the element of applicability to the case at bar. The agreement to purchase the bonds and use them in re-organizing the insolvent railroad corporations had in it nothing, even of actual fraud, much less of criminality. If there is any element of grand larceny in this case—anything akin to highway robbery—it arises, not in the purchase itself, but at the point where these defendants, having got into their possession all of the property purchased by the bonds in which complainant was interested, seek to defraud him of his just rights by raising the cry that as receiver he was incapable of taking or holding such interest. This cry is raised for the sole purpose of diverting attention from the attitude of defendants themselves. The case of the highway robbers on Hounslow Heath, has no more pertinency to the case at bar than it has to that of *Brooks* v. *Martin*, which it was apparently introduced to ridicule.

## IV.

On the oral argument, the cases of *Gregory ads. Wilson*, 36 N. J. Law, 315, and *Snell* v. *Dwight*, 120 Mass. 9, were cited by counsel for appellees as being on lines opposed to the decision in *Brooks* v. *Martin*.

In *Gregory ads. Wilson*, the court, after reviewing *Tenant* v. *Elliott*, 1 B. & P. 3, *Farmer* v. *Russell*, 1 B. & P. 296, *Sharp* v. *Taylor*, 2 Phillips, 801, *McBlair* v. *Gibbs*, 17 How. 232, *Brooks* v. *Martin*, 2 Wall. 70, *Woodworth* v. *Bennett*, 43 N. Y. 237, and *Merritt* v. *Millard*, 4 Keyes, 208, and also a decision by the vice chancellor in 8 C. E. Green, 257, apparently dissenting therefrom, says: "But it thus appears that there is authority entitled to the very highest consideration in favor of the doctrine that, in cases where an illegal thing has been completely done, and the money growing out of such transaction being due to two or more persons has been received by one of them for himself and his associates, or by

a third person for such wrongdoers, an action will lie for such money in behalf of the party to whom it is coming, either in whole or in part. The principle seems to be that such right of action will arise when the circumstances are such that the fund in question can be regarded as money received for the benefit of the party bringing the suit." And while the learned court intimated that the rule has in some instances been carried too far, he decided that the case then under consideration was not within the scope of the rule, because in that case no money had been paid over, either to a partner of the plaintiff, or to a third party for him, and that it did not appear that the defendant had moneys in his hands which were paid to him, either in whole or in part, for the plaintiff.

In *Snell* v. *Dwight*, 120 Mass. 9, the contract sought to be enforced, and the transactions out of which the profits had been made, had relation to trade with the public enemy in time of war, prohibited alike by public law and by the statutes and regulations of the United States, and were necessarily illegal and absolutely void. In this respect the case was similar to that of *Coppell* v. *Hall*, 7 Wall. 542, and other cases considered in our original brief, and clearly distinguishable from the case at bar, and from other cases of contracts and purchases which are voidable only.

In *Snell* v. *Dwight*, the court review the English and American cases referred to in *Brooks* v. *Martin*, and do not dissent from the rule of law laid down in those cases, except that as to the case of *Sharp* v. *Taylor*, 2 Phil. Ch. 801, the court say: "Taking into view the fact that the defendant was the partner of the plaintiff in the original enterprise from which the money accrued, and the difficulty of reaching him except through the illegal partnership transactions, the soundness of the decision may be open to question; but *assuming that the distinction upon the facts made by the court is correct, it is sustained by the authorities.*" And as to *Brooks* v. *Martin*, the court say: "The case may be open to the same criticism, *as to the application of the rule*, as has been suggested in regard to *Sharp* v. *Taylor*, *ubi supra;* but as it

is so clearly to be distinguished from the case at bar, it is not necessary to consider that question, and it may be, as the soldier alone could take advantage of the illegality, and avoid the sale by himself of a land warrant before it was issued, the titles under such warrants being good, that the case would fall within the principle laid down in *Harrey* v. *Varney*, 98 Mass. 118."

V.

*Harvey* v. *Varney* was a bill in equity by one partner against his copartners in the manufacture and sale of boots and shoes. alleging that they wrongfully withheld from complainant his interest in the partnership property, praying for an account, receiver, etc. The defense was that the purpose of the partnership was fraudulent, and evidence was introduced to show that it was formed for the purpose of transferring to it the property of a former firm, which was insolvent at the time of the transfer, and that this transfer was to defraud the creditors of that firm. The Supreme Court of Massachusetts held: (1.) That a contract, whether executed or executory, for the conveyance of either real or personal property, to conceal it from attachment by the grantor's creditors, although voidable by such creditors, is valid as between the parties, even though the grantee shared in the fraudulent intent. (2.) That the fraudulent character of the purpose of a partnership as to creditors, is no defense to a bill in equity, brought by one of its members against the others for a settlement of the affairs of the firm.

The learned justice who delivered the opinion of the court said:

"In this commonwealth a long series of cases has established the rule that a transfer either of real or personal property, made with a view to defraud the creditors of the grantor, although the grantee has participated in this intent, is good between the parties, and void as against creditors only; or, to speak accurately, is voidable by creditors

at their election. If no creditors intervene, the conveyance stands; if creditors elect to affirm the transfer and receive the consideration, it is thereby ratified and confirmed. Payment of the grantor's debts to the full value of the property purges the fraud: *Drinkwater* v. *Drinkwater*, 4 Mass. 354; *Oriental Bank* v. *Haskins*, 3 Met. 332; *Crowninshield* v. *Kittridge*, 7 Met. 520. This doctrine is not restricted to executed contracts; but such as are executory merely are likewise treated as valid between the original parties, although they were entered into for the purpose of keeping the creditors of the vendor from attaching the property: *Knapp* v. *Lee*, 3 Pick. 452. In *Dyer* v. *Homer*, 22 Pick. 253, this precise point was decided, and it was held that a note given for the price of chattels sold for the express purposes of keeping them from attachment by the creditors of the vendor, who by agreement retained possession of the property after the sale, was valid, and that the sale itself between the parties must be treated as fair and obligatory. This case was twice before the court, the first opinion being pronounced by Mr. Justice Morton, in 1839, and the second by Chief Justice Shaw, in 1840, both announcing the same doctrines and fully stating the reasons in their support. It was declared that the parties to a contract can not be allowed to defeat it by alleging their own fraud; that the transaction was not *turpis causa* and therefore void, but was valid until avoided, and that the note given for the price was good in the hands of the vendors, and could be enforced for the residue, after a partial failure of consideration caused by a levy on a portion of the property, sold by a creditor of the vendor. See also *The Lion*, 1 Sprague, 40. These authorities are decisive of the law in this commonwealth, and render it unnecessary to make a particular examina- of the cases elsewhere cited by the defendant."

The court thereupon consider various cases cited *contra*, particularly *Canton* v. *Dorchester*, 8 Cush. 525, as to which they say: "Obviously, the question whether a contract to recover an estate could be avoided by proving that it and the deed were both given to cover up the property from at-

tachment was not distinctly presented to the court, nor involved in the case under examination. We can not suppose that it was intended in an incidental and summary manner to overrule the entire current of authorities, and particularly the elaborate and well considered case of *Dyer* v. *Homer*, with the doctrines of which we remain fully satisfied, after a careful reconsideration." "The result is, that the defendants in equity can not be allowed to prove that the stock taken from the old firm of Hunt & Lane by the new firm of Varney & Harvey, was transferred to conceal it from attachment, and the notes given therefor are held to be valid.

"The question, whether an account between the members of the new partnership should be refused, and each be allowed to retain the share which happenes to remain in his hands, without regard to equality, depends upon similar principles. There was no element of illegality or immorality in the business of the firm. Because the plaintiff's intrest was that of a silent partner, and was kept concealed in order that it might not be attached by his creditors, the defendants who participated in this purpose can not be allowed to disclose the common fraud of both parties, and thereupon appropriate to themselves his share of the capital and profits of the partnership. Except so far as creditors intervene to assert their rights, the interests of the several partners must be adjusted as if no such fraudulent purpose existed. To hold otherwise, and to apply to this case the maxim, "*in pari delicto potior est conditio defendentis*, would be to exercise rigor beyond the limits of wholesome severity."

The case of *Harvey* v. *Varney* clearly establishes the rule that, as between the parties to the contract, it is not void—it is not even voidable—it is a contract which a court of equity will enforce by directing an accounting. When the defendants, who were parties to the contract, attempted to urge as their defense that the contract was made with intent to defraud some other persons, not before the court, the court replied in substance: The transaction not being *turpis causa*, no moral turpitude being involved, you are estopped to

raise that objection. The maxim, "*In pari delicto, &c.*," does not apply. It is true that the contract, as between complainant and creditors, is voidable at the election of the latter. But as between you and the complainant the contract is valid and will be enforced. And the court directed an accounting.

VI.

The doctrine of *Harvey* v. *Varney*, 98 Mass., *supra*, is also in harmony with the rule as laid down in the notes of Hare & Wallace to *Fox* v. *Mackreth*, 1 Lead. Cas. in Eq. (3d Am. Ed., p. 217, 218, and cases cited).

"A purchase by a trustee is not absolutely void; it is voidable only by the *cestui que trust*, in equity, and then only upon certain terms; it is valid in equity as well as at law, unless some of them choose to avoid it."

The fact that the trustee, or person claiming through him, was the party plaintiff at law or complainant in equity seeking relief, has been held not to affect the application of the rule.

The following are cases at law:

*Harrington* v. *Brown*, 5 Pick. 519.
*Knox* v. *Jenks*, 7 Mass. 492.
*Jackson* v. *Walsh*, 14 Johns. 408.
*Murphy* v. *Teter*, 56 Ind. 545.

The following are cases in equity:

*Beeson* v. *Beeson*, 9 Barr, 280, and cases cited.
*Mulford* v. *Minch*, 3 Stockton, 16.
*Thorp* v. *McCullom*, 1 Gilm. 614.
*Rice* v. *Cleghorn*, 21 Ind. 80.
*Dunlap* v. *Mitchell*, 10 Ohio, 117.
*Baldwin* v. *Allison*, 4 Minn. 25.
*Kent* v. *Chalfant*, 7 Minn. 487.
*Exparte Wiggins*, 1 Hill's Ch'y (S. C.) 353.
*Buell* v. *Buckingham*, 16 Ia. 284.
*Harvey* v. *Varney*, 98 Mass. 118.

The foregoing cases are full to the point that where the *cestuis que trust*, or persons entitled to complain, are not before the court nor complaining, the contract or purchase, as the case may be, will be enforced and relief given thereon, as between the parties to the transaction who do not stand in the relation of *cestui que trust*.

Respectfully submitted,

HENRY D. BEAM,
EDWARD D. COOKE,
*Solicitors for Appellant.*

GEORGE F. EDMUNDS,
*of Counsel.*

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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

JESSE P. FARLEY, *Appellant*,
*vs.*
NORMAN W. KITTSON, JAMES J. HILL, AND THE ST. PAUL, MINNEAPOLIS, & MANITOBA RAILWAY COMPANY, *Respondents.*

No. 197.

# BRIEF FOR RESPONDENTS.

H. R. BIGELOW,
GEO. B. YOUNG,
Counsel for Respondents.

WEST PUBLISHING CO.'S JOB PRINT. 313 WABASHA ST., SAINT PAUL, MINN.

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No. 197.

## BRIEF FOR RESPONDENTS.

### STATEMENT.

I.

On July 14, 1873, a suit was brought in the circuit court for Minnesota by holders of bonds of a $15,000,000 issue, secured by mortgage of the unfinished lines, land grant and franchises of the St. Paul & Pacific Railroad Company, a Minnesota corporation, praying for a foreclosure of the mortgage, and also that the court would appoint a receiver of the mortgaged property, and by such receiver complete the lines, so as to secure the congressional land grant.

(Record, pp. 52, 67–8.)

On August 1, 1873, that court appointed the plaintiff as receiver. He duly qualified, and took possession, and held and operated the lines until June, 1879, when the property was sold under decree of foreclosure to the defendant the St. Paul, Minneapolis & Manitoba Railway Company, (hereinafter styled for brevity the Manitoba Co.)

The plaintiff, however, had not been discharged as receiver, nor settled his accounts as such, when this cause was heard on the bill, plea and proofs, in July, 1882.

(See Record, fols. 88–9, 91, 150.)

In October, 1876, the trustees in certain mortgages on the lines, land grant and franchises of the First Division of the St. Paul & Pacific Railroad Company, (also a Minnesota corporation and hereinafter styled the First Div. Co.,) securing divers issues of bonds to the aggregate amount of $13,000,000, took possession of the mortgaged property, (by virtue of powers in the mortgages,) and appointed the plaintiff their general manager. He continued to be such, and to operate these lines for the trustees in possession, until June, 1879, when these lines also were turned over to the defendant, the Manitoba Co., as purchaser at the decretal sales in suits brought by the trustees to foreclose these mortgages.

All these lines constituted but one entire system of railroad, belonging originally to the St. Paul & Pacific Co., and afterwards (in 1864) divided in ownership between that company and the First Div. Co.

In 1877, and while plaintiff was receiver of the property of one company and general manager under the trustees in possession of the property of the other company, the defendants Kittson and Hill (together with George Stephen and Donald A. Smith, who are not parties to this suit) associated themselves together to purchase the bonds secured by the various mortgages on the lines of each company, which bonds were nearly all held in Holland. They bought these bonds in their own names alone. Most of the purchases were on a credit extending until after the lines should have been sold under foreclosure decrees, it being optional with the sellers then to receive payment in cash or in bonds of a new issue. Whatever money was paid down was furnished and paid by Smith, Stephen, Kittson, and Hill. They took title in their own names, and bought the bonds in order to use them in the purchase of the mortgaged property when it should be sold under decrees in the various foreclosure suits.

In May, 1879, the defendants Kittson and Hill, together with Smith and Stephen, organized the defendant the Manitoba Co., for the purpose of acquiring, holding and operating the various lines of railroad

and the other mortgaged property, when offered for sale under foreclosure decrees.

In March and April, 1879, foreclosure decrees were entered in all the suits, under which decrees all the mortgaged property was sold to the Manitoba Co., in June, 1879, all the bonds bought by Smith, Stephen, Kittson and Hill being used in part-payment, and those gentlemen also furnishing the cash needed and used as part of the purchase price.

The entire property thus bought comprised over 500 miles of railroad in Minnesota, with its equipment and land grant, worth (as stated in the bill) over $23,000,000. The Manitoba Co., soon after its purchase, issued and negotiated its mortgage bonds to the amount of $8,000,000, out of the proceeds of which it paid for the old bonds purchased by Smith, Stephen, Kittson and Hill, and all expenses.

The capital stock of the Manitoba Co. was fixed at $15,000,000, in $100 shares, and is worth par. Of this stock 57,646 shares were issued to Kittson and Hill. Besides this stock, other large profits have been realized from the operation of the lines and sale of lands, and have been divided among Smith, Stephen, Kittson and Hill.

The plaintiff brings this suit to establish a right to one-sixth of these profits—including one-sixth of the $15,000,000 capital stock of the Manitoba Co.

II.

Clearly, the facts above stated, standing alone, afford no ground for any such claim. The defendants, with others, bought bonds in their own names and with their own money and credit. They organized the Manitoba Co., and, as such corporation, they bought and paid for the mortgaged property with their own money and with the bonds before purchased by them. They made a large and a legitimate profit, and as yet no more reason appears why they should divide with plaintiff than with all the citizens of the United States.

The plaintiff, however, sets forth *an alleged contract* by which, as he claims, he acquired a right to the share in the profits which he is seeking to obtain. On that contract all his rights depend. Without the contract he has no rights; and *this suit is a suit founded entirely on the contract*, and is brought for a speci ic enforcement—to obtain *in specie* the property which, as plaintiff says, it was agreed he should

have. And as his case must rest on his contract, it necessarily follows that if, for illegality, or want of consideration, or any other cause, his alleged contract is void or is not enforceable, he has no claim on the defendants, and is entitled to no relief.

This contract, alleged to have been made by plaintiff with Kittson and Hill, is thus stated in folios 53–56 of the amended bill, pages 18 and 19 of the record.

The plaintiff there says (Page 19, fols. 55–6,) that in 1876, (three years after he became receiver:)

"He had knowledge not possessed by any of the other parties as to the whereabouts and situation of said bonds, the rated value thereof by the holders, the mode whereby and the channel through which the same could be reached and procured, also *in respect to the situation, amount, character and value of the lines of railroad and property* mortgaged to secure said bonds, and *in respect to the pending suits for the foreclosure of said mortgages*, and that the services of your orator in respect to all of said matters, and his co-operation, were indispensable to the success of said enterprise."

This "enterprise" was the purchase of the mortgage bonds *and the acquisition of the mortgaged property, by means of the bonds so purchased.*

Having this special knowledge, and wishing to trade upon it to his own profit, the plaintiff says (p. 18, fol. 53,) it was agreed between himself and the defendants Kittson and Hill:

"That they would jointly undertake, for their joint, mutual and equal interest, benefit, advantage and profit, to acquire by purchase or contract all the bonds possible to be obtained of" (the First Division Co. and the St. Paul & Pacific Co.,) "which bonds had theretofore been issued by said respective companies, and were outstanding and for sale by the holders thereof at a large discount, and were secured by mortgages upon the lines and other property of said companies, and which mortgages were then in process of foreclosure in five several suits in courts in said state for default in the payment of the interest upon said bonds."

The plaintiff proceeds (fol. 54, p. 19) to state the ultimate purpose of the parties:

"That *the understanding, object, purpose and agreement of said parties in acquiring said bonds was to become the purchasers of said lines of railroad and other mortgaged property when offered for sale under decrees for the foreclosure of said mortgages, and to turn in and use said bonds in payment or part-payment therefor, and thereby, through and by means of said bonds, acquire said lines of railroad and other property.*"

After stating that Mr. Kittson represented that he could procure the necessary funds from Smith and other Canadian capitalists, and what interest in the enterprise should be given them, and that the interest retained should be divided equally between plaintiff, Kittson and Hill, the amended bill further states (fol. 55, p. 19) that—

"It was also then and there further agreed by and between your orator and said Kittson and Hill that the details of *the negotiations* for procuring the necessary funds and *for the purchase of said bonds should be* principally *conducted and managed by the said Kittson and Hill*, and such person or persons as an interest in said enterprise should be given to for furnishing funds therefor, *and that your orator should furnish such facts, information and advice, and render such aid and assistance therein from time to time as should be required of him.*"

And then follows the statement already quoted as to plaintiff's peculiar knowledge, which explains what "facts, information and advice," the plaintiff says he expected and agreed to give.

That the alleged agreement and "enterprise" contemplated the acquisition of the mortgaged property as well as the mortgage bonds, is further shown by the following averments in the amended bill, (p. 20, fol. 57:)

"Said purchases (of bonds) were made *by and in name of said Smith, Stephen, Kittson and Hill*, but *for the purpose and with a view to their use in the purchase of said lines of railroad* and other mortgaged property when offered for sale under foreclosure decrees, and *under and in pursuance of the agreements* and understandings *between your orator and the said Kittson and Hill* hereinbefore stated in respect thereto."

And again, (p. 20, fol. 59:)

"It was the understanding on the part of all said parties that *as soon as said lines of railroad* and other mortgaged property *should be acquired by them* under said decretal sales, a new issue of bonds should be made," etc.

And again, (p. 22, fol. 63,) the plaintiff says that the Manitoba Co. was organized by Smith, Stephen, Kittson and Hill, for the purpose of buying the mortgaged property at the decretal sales, "for the use and benefit of the said parties interested in the purchase of said bonds as aforesaid."

And again, (p. 24, fol. 69:)

"That a large amount of the said capital stock of said railway company has been issued by said company * * * and that the said railway company has delivered to the said Kittson and Hill 57,646 shares thereof, * * * *being a portion and part thereof to which*

*your orator and the said Kittson and Hill are entitled under and pursuant to the said arrangement made with said Smith and Stephen in connection with said enterprise."*

And other averments of the bill are to the same effect. (See pp. 22–3, fols. 65, 67.)

We have gone thus into detail on this point, because it was argued in the circuit court that the agreement on which the suit is based was merely an agreement *for purchasing the bonds*, and *not* an agreement *for the acquisition of the property by means of the bonds*, and that it was therefore not open to the objections there made to it. See opinion of *Treat*, J., in Record, p. 37, fol. 107.

In averring plaintiff's performance of the agreement on his part the amended bill states, (p. 20, fol. 58:)

"That throughout said negotiations for the purchase of said bonds, and in the purchases thereof, your orator was continuously called upon by the said Kittson and Hill for facts and information, advice and co-operation in respect thereto, and at their request rendered the same pursuant to the aforesaid agreements and understandings between them; and that said negotiations were only successful through and by means of the advice and co-operation of your orator, and the facts and information peculiarly within his knowledge as aforesaid, and imparted by him to the said Kittson and Hill, at their request, under said understandings and agreements as aforesaid."

It seems plain enough (in view of plaintiff's position as receiver of one line and general manager under the trustees of the other) that *plaintiff's alleged agreement was to be and was kept secret from the court and from his cestuis que trust.* This is the fair inference from the passages underscored in our extracts from the bill, and is clearly shown by the plaintiff's own testimony on cross-examination, (Record, pp. 44–46, and especially questions 5, 6, 13, 16–19, 25–27,) and by Judge Dillon's order, Exhibit B., par. 2; Record, p. 48.

In his original bill (Record, pp. 1–8) the plaintiff omitted to state that he was receiver or general manager and thereby escaped a demurrer. These facts were, however, set up by plea to the original bill, (pp. 15–16,) and in his amended bill, (p. 21, fol. 60,) while he admits that he was at one time receiver and general manager, the defendants deemed it proper to present, by plea, a particular statement of the facts.

In this plea they say that they ought not to be required to answer the bill, for the reason that the alleged contract, on which the plain-

·iff's case is based, was illegal because in violation of his trust as receiver and general manager, and was a fraud upon the court and the bondholders.

Record, pp. 32–3, fols. 92–3.

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## ARGUMENT.

The one question presented by this record is: Will a court of equity aid this receiver and general manager to recover, in this suit, from these defendants, what he claims to be his share of the profit of upwards of $15,000,000, which, as he alleges, has resulted from the purchase of the mortgage bonds and the mortgaged property by Messrs. Smith, Stephen, Kittson, and Hill, with their own money, and in their own names and that of the Manitoba Company alone?

This question may be conveniently discussed under the following heads:

1. What is the scope and meaning of the alleged contract between plaintiff and the defendants Kittson and Hill.

2. Whether such alleged contract was a lawful contract.

3. Whether, if the contract was unlawful, such illegality is a bar to this suit.

### FIRST.

#### AS TO THE MEANING AND SCOPE OF THE ALLEGED CONTRACT.

This contract clearly contemplated and provided—

1. For a purchase not merely of the mortgage bonds, as an end in itself, but for a purchase of the mortgaged property by means of the bonds.

This is apparent from the passages already quoted and italicised in our statement of the case, *supra*.

2. That plaintiff's sole contribution to the enterprise—*the only consideration for the promises of defendants*—consisted of the "knowledge, information and advice," which, by reason of his position as receiver of one line and general manager for the trustees in possession of the other line, he was able to and agreed to furnish to the defendants Kittson and Hill.

3. The agreement also contemplated and provided that these purchases should be made in the manner they were actually made—that is, in the names of persons other than the plaintiff.

And it contemplated (and this was, and was considered by the parties, essential to the success of the "enterprise,") that the plaintiff's interest in the purchase of the bonds and in the purchase of the mortgaged property should be kept secret alike from the court and from the stockholders and bondholders of the two companies.

And the concealment thus agreed on was actually practised.

Testimony of plaintiff, in Record, pp. 44, 45, 46–7.

And if the agreement merely contemplated a purchase of the bonds, and not a purchase of the mortgaged property by use of the bonds, or if the transactions which took place were not those agreed upon, then the profits realized are not the fruits of the contract, and are not recoverable as such or at all.

If the agreement contemplated a purchase in the name of all the parties, without concealment of plaintiff's interest, then the purchase made by defendants in their own names, and with their own funds alone, was a purchase for their own benefit alone, and not for the joint use of themselves and plaintiff; a purchase not under, but in derogation and repudiation of the contract; a purchase which might subject the contracting parties to an action for damages for breach of contract, but would give the plaintiff no interest in the bonds or the railroad purchased, or in any profits accruing from the purchase.

*Farley* v. *Kittson*, 27 Minn. 102.

"'If two agree to purchase, and one furnishes all the money and takes the title to himself, no trust results to the other."

1 Perry on Trusts, § 133.

If the plaintiff has any case in this suit, on his own theory, it is because the purchase of the bonds and the property by the other associates in their own names or that of the Manitoba Co., was the very purchase originally agreed to be made—that is, a purchase in which they alone should be the ostensible buyers, and plaintiff's interest should not appear.

## SECOND.

### AS TO THE ILLEGALITY OF THE CONTRACT.

THE ALLEGED CONTRACT AND ALL THE TRANSACTIONS UNDER IT, AS DETAILED BY PLAINTIFF, WERE IMMORAL, FRAUDULENT AND UNLAWFUL—

1. IN THE CONSIDERATION TO BE FURNISHED BY THE PLAINTIFF.

2. IN THE THINGS AGREED TO BE DONE BY THE OTHER CONTRACTING PARTIES.

3. IN THE OBJECT AND PURPOSE TO BE ACCOMPLISHED.

4. IN THE MEANS TO BE USED, AND WHICH PLAINTIFF SAYS WERE IN FACT USED, TO EFFECT THAT OBJECT.

The purpose of the contract was to acquire for less than its value railroad property of great value, of part of which the plaintiff was receiver, and of another part general manager for mortgage trustees in possession. This property was to be acquired by purchase at decretal sales in foreclosure suits, which purchases were to be for the joint benefit of the plaintiff and the other associates, but were to be made in the name of the other associates alone. The plaintiff was to aid in carrying out the scheme by furnishing to his associates facts, information and advice which his position as receiver and general manager enabled him to give them, but which he had no right to use for the benefit of himself or his associates, but only for the benefit of all his *cestuis que trust*. Plaintiff and his associates were to and, as he says, did unite in concealing his interest in the enterprise from the court whose receiver he was, and from the stockholders and bondholders who were his *cestuis que trust*. And in consideration of these services of plaintiff, his associates were to give him a share in the results of the scheme. The plaintiff, as he says, undertook to and did deceive the court, the bondholders, the two companies and their stockholders—in short, every person and class of persons to whom he owed the duty of entire candor, and whose interests he was bound to protect. This very concealment would stamp the purchases—and especially the purchases of the mortgaged property at the decretal sales—as actually and grossly fraudulent, and the court should so declare without further inquiry, upon the ground that they were made by the intervention of persons who were nominal buyers of the property for the purpose of conveying a share in it to the plaintiff.

*Michaud* v. *Girod*, 4 How. 503.

In the case cited, this court says, (p. 553:)

"The rule of equity is, in every code of jurisprudence with which we are acquainted, that a purchase by a trustee or agent of the particular property of which he has the sale, *or in which he represents another*, whether he has an interest in it or not, *per interpositam personam*, carries fraud on the face of it."

And the enormous profit of upwards of $15,000,000, which the bill states was realized, whether made in the purchase of the bonds or of the mortgaged property, or—as would seem most likely—in both purchases, shows, not only that the plaintiff's conduct was grossly fraudulent, but that he was utterly reckless of the extent of the ruin which his fraud might work upon his *cestuis que trust*.

There have been cases where gross frauds in the foreclosure of railway mortgages have received deserved condemnation from this court. But neither *Drury* v. *Cross*, 7 Wall. 299, (where the court says, at page 305: "The scheme to acquire the property of this corporation was in its inception fraudulent, and every step in the progress of its execution was necessarily stamped with the same character;") nor *Jackson* v. *Ludeling*, 21 Wall. 616, (where still greater wrongs than those recited in *Drury* v. *Cross* are yet more vigorously denounced by the court,) affords a parallel to the case here stated by the plaintiff. There, as here, trusts were violated and *cestuis que trust* defrauded. But in this case the receiver—the trusted, confidential officer—of the circuit court, says that he has not only defrauded every person and class of persons interested in the property in his charge, but, to accomplish this purpose, has wilfully deceived the court. To the guilt of fraud upon his *cestuis que trust*, he has added the guilt (absent from those cases) of a fraud upon the court—a fraud upon the administration of justice.

The character of the enterprise in which the plaintiff says he engaged, and the profits of which he seeks to recover, are thus stated by *Treat*, J., in his opinion sustaining the plea:

"The theory of the bill, the plaintiff's own testimony, and all the facts and circumstances proved, demonstrate that the scheme was to acquire the large railroad properties through the acquisition and use of the depreciated bonds. The plaintiff urges that he devised the plan, and that without the assistance he alone could give the plan would necessarily fail. He goes even further in disclosing that only through concealment of his connection with the operations could success be reached. He held an eminently fiduciary relation to all in-

terested in the property committed to his management, and it was through information thus acquired and concealed from the beneficiaries, also from the state and United States courts, that the contemplated fraud could be effected."

Record, p. 37, fol. 107.

"The plaintiff conceived a scheme to wreck the vast interests which it was his duty to protect. He had acquired in his fiduciary capacity information through which the desired end could be reached. It was necessary for him to have confederates; that he should impart to them his secret information; that he should continue through the progress of the scheme to advise with and inform them of what from time to time became known to him; that his connection with them should be concealed from the courts to whose orders he was subject, and which had a right to rely upon his fidelity. Through a betrayal of his trust under such circumstances, according to his version of the facts, these vast railroad properties have been secured, and a profit realized of possibly $15,000,000, or more. His pretence now is that, through betrayals of official and *quasi*-judicial trusts, his confederates have amassed properties, moneys and values to a vast amount, with an understanding from the beginning that they were to reward him for his betrayals by sharing with him one-sixth or some other portion of the spoils. They deny his averments, and he charges that they repudiate the fraudulent contract they made with him. As they do not divide the spoils, this suit is brought to compel them and the railroad defendant, as if by specific performance, to issue to him his proportionate shares of its capital stock, and also grant him proportionate parts of profits and gains, and also interests in undivided property yet remaining."

Record, p. 38, fols. 111–112.

And the court adds: "This is a sad picture, and a strange demand to present to a court of equity."

## THIRD.

THE CONTRACT BEING THUS UNLAWFUL, IMMORAL AND FRAUDULENT IN ITS CONSIDERATION, IN ITS PURPOSE, AND IN THE ALLEGED PROMISES OF THE DEFENDANTS, THIS ACTION FOR THE ENFORCEMENT OF THOSE PROMISES CANNOT BE MAINTAINED.

### I.

We take it to be well settled that a trustee who has conspired with other persons to defraud his *cestuis que trust* cannot, after the conspiracy has been successfully carried out, recover from his confeder-

ates his share of the profits of the fraudulent scheme, realized at the expense of his *cestuis que trust*.

And certainly is it true that no such recovery can be had where the plaintiff was a receiver—a public officer—and the conspiracy involved and necessitated a fraud upon the court which appointed him, and where the recovery can be had only by means of a specific enforcement, in a court of equity, of the agreement by which the conspiracy was formed.

The bill nowhere charges that, in using the bonds to pay for the property, or in converting plaintiff's interest in the bonds into an interest in the stock of the Manitoba Company, the defendants acted without authority, or were guilty of any fraud, or departed in any particular from the terms of the original agreement. On the contrary, the bill expressly states (as has been already fully shown) that everything done in the purchase of the bonds, in their use in the purchase of the mortgaged property, and in the conversion of the bonds into capital stock of the company, was done in fulfilment of the original agreement and was expressly authorized by it. This, then, is not a case where trustees or *quasi* trustees have, without authority, or by fraud, converted the trust property into other property, and the *cestui que trust* seeks to follow the trust property into that into which it has been converted. *If there is any trust here, it is a trust created by the original agreement of the parties, and, in seeking to enforce such trust, the plaintiff is simply seeking to enforce that agreement.*

It is of no consequence by what name this bill is called. Whether it be styled a bill for specific performance, or a bill to enforce a trust, still, since the only trust in the case is a trust created by the original agreement, the suit is in effect a suit for specific enforcement of that agreement. The plaintiff can make no title to any relief except under and through that agreement, and therefore he sets out, as he is obliged to set out, that agreement in his bill. And because his claim to relief is founded on that agreement, and he is asking the aid of the court to get what that agreement, if made and if valid, would give him, we say that he is not entitled to such aid or to any relief, because the agreement which he says was made and carried on was so infected with fraud that no party to it could acquire any rights under it, and hence the courts will not enforce it in favor of either party againt the other.

## II.

In this position we are abundantly sustained by repeated decisions of this court, a few of which we cite.

In the early case of *Bartle* v. *Coleman*, 4 Pet. 184, Bartle (a contractor with the United States for the rebuilding of Fort Washington,) made a partnership with Coleman and with one Marsteller, (who was deputy quarter-master general and charged with the rebuilding of the fort,) to share equally the profits of the contract. The work was begun and finished, at a profit (as was supposed) of $4,500, as his share of which Coleman was paid $1,500. Soon afterward it was discovered that Marsteller had practised great frauds upon the government, and also that the business had in fact resulted in a loss of $10,538, one-half of which Bartle charged to Coleman, (Marsteller having died insolvent,) and sought to have it deducted from the amount of a judgment recovered against him by Coleman. Of this loss, the sum of $8,860 resulted from a disallowance by the government of overcharges and over-measurements.

In dismissing the bill, the court say, (p. 187:)

"The case, then, presented for the consideration of the circuit court, and now before us for revision, is this: a contract made by the complainant with a public agent, a deputy quarter-master general, to an amount exceeding $50,000, in the profits of which he was to participate; false measures attempted to be imposed on the government; the fraud discovered by the vigilance of its accounting officers; and a bill in equity filed to compel an alleged partner to account for and pay to one of the parties in such a transaction the one-half of a loss sustained by the unsuccessful attempt to impose spurious vouchers on the government.

"To state such a case is to decide it. Public morals, public justice, and the well-established principles of all judicial tribunals, alike forbid the interposition of courts of justice to lend their aid to purposes like this. *To enforce a contract which began with the corruption of a public officer and progressed in the practice of known and wilful deception in its execution*, can never be consummated or sanctioned by any court.

"The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply-practised fraud, which, when detected, *deprives him of anticipated profits*, or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers by shifting the

loss from the one to the other, *or to equalize the benefits or burthens* which may have resulted by the violation of every principle of morals and of laws."

In *Randall* v. *Howard*, 2 Black, 585, a scheme was planned and carried out between mortgagor and mortgagee to hasten a sale under a decree of foreclosure, in order to defeat an attempt (charged to be fraudulent) by other persons to obtain possession of part of the mortgaged lands. A petition to the court for an immediate sale was made and granted, the parties agreeing that the mortgagee should buy ostensibly for himself, but should really hold the land as security for the decreed indebtedness, on payment of which the purchase should enure to the benefit of the mortgagor's wife. The sale took place accordingly, and the mortgagee bought the land for much less than its value, on account of the understanding that the sale was merely formal, and not intended to divest the mortgagor's title. The sale was confirmed, without objection from the mortgagor or his wife, they being assured that the land should, notwithstanding, be held merely as security. To perfect the form of sale, the mortgagee leased the land to the mortgagor and his wife. Having thus obtained an apparent title, the mortgagee fraudulently began to act as the real owner, claimed the right to sell, and dispossessed the mortgagor and his wife, who thereupon filed their bill to restrain the mortgagee from disposing of the land, for sale of enough to pay him according to the understanding had prior to the purchase, and for a conveyance of the residue to the mortgagor's wife.

In dismissing the plaintiffs' bill the court say, (p. 588:)

"These allegations, stripped of their indefiniteness and vagueness, mean simply this, that the parties to this bill, in order to counteract a claim set up by other parties for a portion of the mortgaged lands, combined together, through the aid of the court, to shorten the time of sale, and to cover up the real ownership of the property. A fraudulent agreement was entered into to defeat, as is charged, 'a fraud attempted against the complainants.' If the claim set up was a fraud on the rights of the complainants, does that consideration change the character of the agreement made to defeat that fraud? Manifestly not. *The whole complaint of the bill is that the defendant will not execute the agreement thus fraudulently made, and the object of the bill is to compel him to do it.*

"A court of equity will not intervene to give relief to either party from the consequences of such an agreement. The maxim, *in pari delicto potior est conditio defendentis* must prevail. *It is against the*

*policy of the law to enable either party, in controversies between themselves, to enforce an agreement in fraud of the law, or which was made to injure another.*

1 Story, Eq. Jur. § 298.
*Bolt* v. *Rogers*, 3 Paige, 154.
*Wilson* v. *Watts*, 9 Md. 356, 455."

In *Wheeler* v. *Sage*, 1 Wall. 518, a firm composed of Wheeler, Sage and Slocum, and engaged in a general produce business in New York, owned a mortgage of real estate in Milwaukee, which the firm itself desired to purchase. To effect this purchase and prevent competition at the foreclosure sale, the firm agreed with the mortgagor (who was insolvent, and had judgments to a large amount against him) that a decree should be entered for $33,000 instead of $24,000, the amount really due. Sage, one of the partners, who was entrusted by the others with this matter, caused the decree to be entered accordingly, but had the property bid off at the sale, not by or for the firm, but by one Mitchell, for the benefit of himself and Mitchell. Each of the other two partners was paid his share of the amount ($24,000) actually due on the mortgage. Wheeler, one of the partners, afterwards brought suit to have Sage declared a trustee of the property bought, for an accounting, etc.

The bill was dismissed, and the court say, (page 529:)

"Generally, when a party obtains an advantage by fraud, he is to be regarded as the trustee of the party defrauded, and compelled to account. But if a party seeks relief in equity, he must be able to show that on his part there has been honesty and fair dealing. If he has been engaged in an illegal business and been cheated, equity will not help him."

And on page 530:

"The correspondence between Wheeler and Sage abundantly proves that to get a decree for the nominal, instead of the real amount due on the mortgage, was one of the main parts of their project. *The court was imposed on*, and a combination formed, the direct object and tendency of which was to secure the title to the valuable real estate of an insolvent debtor, at the expense and sacrifice of his creditors. A proceeding like this is against good conscience and good morals, and cannot receive the sanction of a court of equity. The principle is too plain to need a citation of authorities to confirm it. It is against the policy of the law to help either party in such controversies. The maxim, *in pari delicto melior est conditio defendentis*, must prevail."

Among other cases, differing in facts, but involving the application of the same principle—*ex turpi causa non oritur actio*—are *Marshall* v. *Baltimore & Ohio R. Co.*, 16 How. 314, and *Trist* v. *Child*, 21 Wall. 441. In each of these cases the plaintiff sued on an express contract for compensation for services as a lobbyist. In the first case the lobbying was done in the legislature of Virginia, to obtain a right of way through that state for the defendant's railroad, the price to be paid ($50,000) being contingent on the passage of the legislation asked for. In *Trist* v. *Child*, the lobbying was done in Congress, to obtain an allowance of a money claim of Trist against the United States, the agreement being that Child should receive for his services twenty-five per cent. of the amount allowed. If nothing was allowed Child was to receive nothing.

In each case the court held the agreement to be illegal and void, and therefore no action could be maintained upon it. In the first case (p. 335) stress is laid on the fact of deceit practised on the legislature by concealing Marshall's character as a hired agent; and see page 336.

In the first case the court say, (p. 334:)

"It is an undoubted principle of the common law that it will not lend its aid to enforce a contract to do an act that is illegal; or which is inconsistent with sound morals or public policy; or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions."

In the second case the court say, (21 Wall. 448:)

"In our jurisprudence a contract may be illegal and void because it is contrary to a constitution or statute, or inconsistent with sound policy and good morals. * * * It is a rule of the common law of universal application that where a contract, express or implied, is tainted with either of the vices last named, as to the consideration or the thing to be done, no alleged right founded upon it can be enforced in a court of justice."

And many cases are cited, and, among them, *Tool Company* v. *Norris*, 2 Wall. 45, where an agreement for contingent compensation for procuring a contract from the government for furnishing supplies, was held void, and the plaintiff not entitled to recover, and the court say, (page 56:)

"It is sufficient to observe generally that all agreements for pecuniary considerations to control the business operations of the government, *or the regular administration of justice*, or the appointments to

public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether corrupt means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country."

And see *Creath* v. *Sims*, 5 How. 192, 204.
*Brown* v. *Tarkington*, 3 Wall. 377.

In *Meguire* v. *Corwin*, 101 U. S. 108, in consideration of plaintiff's procuring defendant to be appointed as special counsel for the United States in certain causes, and aiding him in managing them, defendant agreed to pay plaintiff one-half the fee he should receive from the United States. It was *held* that the agreement was not enforceable, the court reaffirming its former decisions.

In *Oscanyan* v. *Arms Company*, 103 U. S. 261, plaintiff (consul-general of Turkey) sued for agreed commissions for using his influence with an agent of his government to obtain for defendant a contract for the sale of arms to it. It was argued that such an agreement was in accordance with Turkish laws and customs; but the court held it to be void, because of "the inherent viciousness of the transaction, its repugnance to our morality, and the pernicious effect which its enforcement by our courts would have upon our people." (P. 277.)

In the cases last cited the agreements were incapable of enforcement because *likely to lead* to frauds in the legislative or executive branches of our own or a foreign government, and without regard to whether the object to be gained was an evil one, or whether corrupt means were in fact used to effect it.

The purity of the courts is at least as important to the commonwealth as that of the other branches of the government. And it is certainly as illegal and as much against public policy to make agreements to deceive the courts, and, by means of this deception, to use them as blind instruments to accomplish the private purposes of the contracting parties, as it is to make agreements to lobby claims through congress or to secure government contracts. And when the person who so makes use of the court is one of its own officers, and he uses it to effect a fraud on those whose interests the court has undertaken and is pledged to protect, such an agreement thus to im-

pose on the court, and by corrupt means to pervert the powers of the court to unrighteous ends, is as clearly against public policy, and as incapable of enforcement, as any of those denounced in the cases cited.

While the fraud in *Randall* v. *Howard* was far less flagrant than that with which the plaintiff charges himself in this case, (for there neither party was an officer of the court or a trustee,) that case, as well as *Wheeler* v. *Sage*, and the later case of *Selz* v. *Unna*, 6 Wall. 327, have this feature in common, that the fraud upon third persons was to be and was perpetrated, in each case, by means of deception and fraud practised on a court of justice, although all three of these cases are decided on the broad ground that courts of equity will not enforce "an agreement in fraud of the law, or which was made to injure another," (*Randall* v. *Howard*,) or "an agreement made with the intent that it shall operate as a fraud upon the private rights and interests of third persons." (*Selz* v. *Unna*, 6 Wall. 327, 335–6.) Whether the agreement involves a fraud upon the public or upon an individual, the violation of a public and official or of merely a private trust, it is equally condemned.

See, also, *Tufts* v. *Tufts*, 3 Woodb. & Minot, 456, 508.

## FOURTH.

### ANSWER TO PLAINTIFF'S ARGUMENT.

In the circuit court the plaintiff contended, as we assume he will in this court,

1. That the agreement was merely an agreement for a partnership in the purchase of the bonds, and not in the purchase of the mortgaged property, and that plaintiff might lawfully be a secret partner in it.

The assumption of fact in this position has already been disproved by the record.

And although a railway mortgage trustee, not in possession, may lawfully buy the mortgage bonds in open market, neither such a trustee, if in possession of the property, nor his general manager, can lawfully enter into a scheme to be a secret partner in the purchase of bonds which are not purchasable in market, but can only be obtained through channels known to the trustee or general manager

alone, and to use for the benefit of his copartners alone his peculiar knowledge in respect to the bonds, the mortgaged property and the foreclosure suits.

*Ashuelot R. R. Co.* v. *Elliott*, 57 N. H. 397.
2 Perry on Trusts, § 749.
Jones on R. R. Securities, § 360.

And still less is it lawful for a receiver to be a secret partner in such purchases.

2. It was further argued that in this suit the court is not asked to enforce the agreement—that the agreement has been fully executed, and plaintiff is seeking relief against the fraud of the defendants in withholding from him his portion of the proceeds.

But whether an agreement to defraud third persons remains executory, or whether it has been executed, a court of equity will always leave the parties to it where it finds them, giving to neither any aid as against the other. *Bolt* v. *Rogers*, 3 Paige, 154. And if the agreement between these parties has been executed, it is not easy to see how either party can have any relief against the other except by way of rescission of the agreement. But this is not what plaintiff asks. He doesn't ask to rescind the agreement. He wishes it to stand, and he prays the court for what he says the agreement gives him. That is, he asks the court to enforce the agreement,—to compel the defendants to do what he says they agreed to do.

If the agreement has been executed, then both parties have done what they agreed to do, and there is an end of the case. But the agreement has not been executed. It has been executed on plaintiff's part. It has been but partially executed on defendants' part. The bonds and mortgaged property have been bought, the new company has been organized, but defendants have not performed their agreement to give to the plaintiff the one-sixth of the capital stock of the Manitoba Company, which constitutes his share of the profit of the enterprise; and he is suing to compel them to do this. Until they have done it, the agreement will not have been executed.

And so, if (as plaintiff claims) this had been merely an agreement to buy bonds, that agreement must necessarily have remained executory on the part of the defendants until they had put plaintiff in possession of his share of the bonds.

The argument based on the assumption that the agreement of the parties has been executed is therefore without foundation in fact, as well as nugatory in point of law.

3. It was also argued that because the breach of trust and fraud contemplated by the alleged agreement between the parties has been fully accomplished by the purchase of the bonds, and the acquisition of the mortgaged property by means of the bonds, the defendants, in whose hands are the profits of the fraudulent scheme, cannot refuse to account for and divide them.

But in all the cases cited by us, the frauds which vitiated the agreements in question had been fully accomplished. Notably in *Randall* v. *Howard* and *Wheeler* v. *Sage*, the defendant was in possession of the fruits of the fraud. The object of the latter suit, as of this, was solely to obtain a division of the profits of the fraud.

As stated by *Treat*, J., (Record, p. 37,) the plaintiff, in the circuit court, mainly relied on *Brooks* v. *Martin*, 2 Wall. 70, in which case certain *dicta* of Lord Cottenham in *Sharp* v. *Taylor*, 2 Phillips, 801, are quoted with approval in the opinion by Mr. Justice Miller.

There is so wide a diversity between the facts alleged here and the facts in *Sharp* v. *Taylor* or in *Brooks* v. *Martin*, that the actual decisions in those cases have little bearing upon this. At first sight some of the expressions of Lord Cottenham and of Mr. Justice Miller may seem to favor the plaintiff's contention, and to assert that *any* agreement for doing an illegal act—even where the illegality consists in defrauding others, or in the betrayal of private or public trusts—will be enforced after the illegal acts have been accomplished—enforced, at least, to the extent of compelling the parties to it to divide the profits resulting from the illegal acts. But "it is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used." *Cohens* v. *Virginia*, 6 Wheat. 264, 399, *per* Marshall, C. J.; *Carroll* v. *Carroll*, 16 How. 275, 287. Thus limited, we have no quarrel with the expressions in either case. That they should be so limited is evident from the "maxim" just quoted, and for the reason that they would otherwise be in direct conflict with the decisions of this court already quoted, (notably *Randall* v. *Howard*, and *Wheeler* v. *Sage*, which last was a case of the same term—December, 1863—with *Brooks* v. *Martin*,) would be without support in the cases

cited by Lord Cottenham, (especially *Thomson* v. *Thomson*, 7 Vesey, 470, decided by Sir Wm. Grant,) and in plain hostility to cases decided by Sir Wm. Grant and by Lord Cottenham himself, and to many other cases, before and since, of great authority.

In *Knowles* v. *Haughton*, 11 Vesey, 168, a suit between partners for an account of the profits of an illegal insurance business, Sir Wm. Grant adopts the same rule for which we here contend.

*Ewing* v. *Osbaldiston*, 2 Mylne & Craig, 53, was a bill to establish a partnership between plaintiff and defendant in the business of managing the Surrey Theatre and in the profits thereof, according to an agreement for partnership contained in certain letters; asking that defendant be decreed to admit plaintiff to the full benefit of the partnership and an equal share of the profits; that defendant be declared to have acted fraudulently, and that he be removed and a manager be appointed by the court; that the partnership be dissolved, an account taken, and defendant decreed to pay to plaintiff what might be found due him on the accounting. The defendant in his answer relied on certain statutes as showing that the performances which the parties had contemplated exhibiting at the theatre could not lawfully be given there, and that, therefore, the alleged contract of partnership was entered into for illegal purposes and was consequently void. Lord Cottenham, after stating the facts, says, (p. 85:)

"It is clear, therefore, that this contract of partnership was formed for the unlawful purpose of representing at the Surrey Theatre prohibited performances. * * * Can this court, under such circumstances, decree to one of the parties to this contract the specific performance of the agreement or any relief growing out of it? To do so would be inconsistent with all principle, and contrary to all the decided cases;" and he proceeds to review the decided cases in support of his decision, viz.: *De Begnis* v. *Armistead*, 10 Bing. 107; *Bartlett* v. *Vinor*, Carthew, 252; *Langton* v. *Hughes*, 1 Maule & Selwyn, 593; *Mitchell* v. *Cockburne*, 2 H. Bl. 379; *Thomson* v. *Thomson*, 7 Vesey, 470; *Ottley* v. *Browne*, 1 Ball & Beatty, 360; and *Knowles* v. *Haughton*, 11 Vesey, 168, overruling *Watts* v. *Brooks*, 3 Vesey, 612.

We confidently oppose this *decision* of Lord Cottenham to his *dicta* in *Sharp* v. *Taylor*.

*Armstrong* v. *Armstrong* and *Lewis* v. *Armstrong*, 3 Mylne & Keen, 45, was a bill to enforce a trust, and a cross-bill for accounting for partnership effects. The business was pawnbroking, and a ques-

tion was made whether the agreement was that Warner (of whom Lewis was the representative) was to be a *secret* partner with Armstrong, (of whom the Armstrongs, parties in this suit, were representatives,) contrary to act of parliament. That issue was sent to a jury, and the opinion of the court of exchequer chamber will be found in *Armstrong* v. *Lewis*, 2 Cr. & Mees. 274. The cause was heard before Sir John Leach, M. R., who says, (page 62:)

"I am of opinion that, upon the whole evidence in the cause, it is clear that there existed an understanding and agreement, and that Warner, if a partner at all, was intended to be a secret partner; and I entirely concur in the opinion delivered in the exchequer chamber that, assuming such fact, no legal partnership was constituted between Armstrong and Warner. The cross-bill must therefore be dismissed."

On appeal the case was heard before Lord Brougham, who says, (page 64:)

"If a person agrees with another to be a secret partner in the business of a pawnbroker, he agrees to do that which is illegal and punishable by 39 and 40 Geo. 3, c. 99, an act containing provisions highly beneficial and bringing the trade in question under regulations which are wholesome to the community. * * * Any agreement of this sort, therefore, is unlawful, can convey no rights in any court to either party, and will not be enforced by decisions at law or by decree here in favor of one against the other of persons equally culpable."

In *Sykes* v. *Beadon*, 11 Ch. Div. 170, the case of *Sharp* v. *Taylor*, was reviewed by the ablest of the recent equity judges of England, Sir George Jessel, M. R., whose searching criticism makes further comment on that case useless.

There are some cases where it is said that even where plaintiff's suit is founded on an illegal contract, he may recover if he can make a case without disclosing the illegality. This distinction is untenable, and is expressly denied by this court in *Oscanyan* v. *Arms Co.*, 103 U. S. 261, 268–9, cited with approval at the present term in *Lee* v. *Johnson*, 6 Sup. Ct. Rep. 249, 251.

The case of *Brooks* v. *Martin* would more nearly resemble this if the parties to it had formed a partnership to obtain soldiers' claims by practising frauds upon the soldiers, and the profits involved had been realized by those fraudulent practices. In such a state of facts the decision must have been the same as in *Wheeler* v. *Sage*.

That the expressions in *Brooks* v. *Martin* cannot be divorced from

the facts of that case and applied to a case like this is at once apparent from this consideration: If they authorize the maintenance of this suit, they would sustain a like action by any of the judges of the circuit court against its receiver or against the ostensible purchasers, founded on an agreement for a secret interest in the purchase,—blind justice aiding alike the profligate receiver and the corrupt judge.

In *Sykes* v. *Beadon*, Sir George Jessel refers to the old case of *Everet* v. *Williams*, which, if not authentic enough to be an authority, is not without value as a parable. It is thus stated in 2 Pothier on Obligations, 3, and, substantially, in 1 Lindley on Partnership, (4th Ed.) 182:

"The bill stated that the plaintiff was skilled in dealing in several commodities, such as plate, rings, watches, etc.; that the defendant applied to him to become a partner; that they entered into partnership, and it was agreed that they should equally provide all sorts of necessaries, such as horses, saddles, bridles, and equally bear all expenses on the roads, and at inns, taverns, or alehouses, or at markets or fairs. 'And your orator and the said Joseph Williams proceeded jointly in the said business with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch; and afterwards the said Joseph Williams told your orator that Finchley, in the county of Middlesex, was a good and convenient place to deal in, and that commodities were very plenty at Finchley aforesaid, and it would be almost all clear gain to them; that they went accordingly, and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things; that about a month afterwards the said Joseph Williams informed your orator that there was a gentleman at Blackheath who had a good horse, saddle, bridle, watch, sword, cane, and other things to dispose of, which he believed might be had for little or no money; and they accordingly went and met with the said gentleman, and after some small discourse, they dealt for the said horse, etc.; that your orator and the said Joseph Williams continued their joint dealing together until Michaelmas, and dealt together in several places, viz., at Bagshot in Surrey, Salisbury in Wiltshire, Hampstead in Middlesex, and elsewhere, to the amount of £2,000 and upwards.' The rest of the bill is in the ordinary form for a partnership account."

The bill is said to have been dismissed with costs to be paid by the counsel who signed it, and the solicitors for the plaintiff were attached and fined £50 apiece.

It will be observed that in *Everet* v. *Williams*, as in this case and in *Wheeler* v. *Sage*, the transactions out of which the profits had arisen had been closed. The robberies had been committed and the

plunder secured. Now if the expressions in *Brooks* v. *Martin* were meant to apply to such cases, the court, instead of refusing to divide among wrong-doers the profits of iniquity, would say: "The transactions which were illegal" (*i. e.*, the robberies) "have become accomplished facts, and cannot be affected by any action of the courts in this case." "That matter" (the question of illegality) "was disposed of when the defendant received the money; and the plaintiff is now only seeking payment for his share of the realized profits. * * As between these two, can this supposed evasion of the law be set up as a defence by one against the otherwise clear title of the other? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that in realizing it some provision in some act of parliament was violated? * * The answer to this, as to the former case, will be that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do between the parties. * * The difference between enforcing illegal contracts and asserting title to money which has arisen from them is distinctly taken," etc.

If such a case as *Everet* v. *Williams* were before this court, or before any member of it in the circuit court, is it likely the court would use any such language as this? Or would the court say, as was said by plaintiff's counsel, that the defendant, having acquired an interest jointly for himself and the plaintiff, taking and holding plaintiff's interest in trust for him, will not be heard to dispute the title of his *cestui que trust?* Or would it be said that upon principle the defendant could not at the same time claim and retain the benefits of the contract with plaintiff, and repudiate it as to his obligations to plaintiff?

That neither this court nor any other would entertain such a bill between highwaymen as that in *Everet* v. *Williams* there can be no doubt. And that case cannot be distinguished from this in principle, nor is there much difference between them in the facts, for the courts are agreed that a railway is merely a modern improved highway.

No man should ever be called on to answer such a bill as the plaintiff's, and the decree dismissing it should be affirmed.

H. R. BIGELOW,
GEO. B. YOUNG,
Counsel for Respondents.

120-303

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

JESSE P. FARLEY, *Appellant*,
*vs.*
NORMAN W. KITTSON, JAMES J. HILL, AND THE ST. PAUL, MINNEAPOLIS, & MANITOBA RAILWAY COMPANY, *Respondents.*
No. 6.

# BRIEF FOR RESPONDENTS ON REARGUMENT.

WM. M. EVARTS,
GEO. B. YOUNG,
Counsel for Respondents.

WEST PUBLISHING CO.'S JOB PRINT, 319 WABASHA ST., SAINT PAUL, MINN.

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No. 6.

## BRIEF FOR RESPONDENTS ON REARGUMENT.

The order for a reargument of this cause makes it proper for us to discuss the questions involved more fully and at large than we should have been justified in doing in an original brief in a cause lying within so narrow a compass. And since the order as notified to us by the clerk contains no intimation that the reargument should be directed to one point rather than another, we must, at the risk of prolixity, discuss them all. In doing so we shall adhere to the positions taken in our original brief.

## STATEMENT.

### I.

On July 14, 1873, a suit was brought in the U. S. circuit court for Minnesota by holders of bonds of a $15,000,000 issue, secured by mortgage of the unfinished lines, land grant and franchises of the St. Paul & Pacific Railroad Company, a Minnesota corporation, praying for a foreclosure of the mortgage, and also that the court would appoint a receiver of the mortgaged property, and by such receiver complete the lines, so as to secure the congressional land grant.

(Record, pp. 52, 67–8.)

On August 1, 1873, that court appointed the plaintiff as receiver. He duly qualified, and took possession, and held and operated the lines until June, 1879, when the property was sold under decree of foreclosure to the defendant the St. Paul, Minneapolis & Manitoba Railway Company, (hereinafter styled for brevity the Manitoba Co.) The plaintiff, however, had not been discharged as receiver, nor settled his accounts as such, when this cause was heard on the bill, plea and proofs, in July, 1882.

(See Record, fols. 88–9, 91, 150.)

In October, 1876, the trustees in certain mortgages on the lines, land grant and franchises of the First Division of the St. Paul & Pacific Railroad Company, (also a Minnesota corporation and hereinafter styled the First Div. Co.,) securing divers issues of bonds to the aggregate amount of $13,000,000, took possession of the mortgaged property, (by virtue of powers in the mortgages,) and appointed the plaintiff their general manager. He continued to be such, and to operate these lines for the trustees in possession, until June, 1879,

when these lines also were turned over to the defendant, the Manitoba Co., as purchaser at the decretal sales in suits brought by the trustees to foreclose these mortgages.

All these lines constituted but one entire system of railroad, belonging originally to the St. Paul & Pacific Co., and afterwards (in 1864) divided in ownership between that company and the First Div. Co.

In 1877, and while plaintiff was receiver of the property of one company and general manager under the trustees in possession of the property of the other company, the defendants Kittson and Hill (together with George Stephen and Donald A. Smith, who are not parties to this suit) associated themselves together to purchase the bonds secured by the various mortgages on the lines of each company, which bonds were nearly all held in Holland. They bought these bonds in their own names alone. Most of the purchases were on a credit extending until after the lines should have been sold under foreclosure decrees, it being optional with the sellers then to receive payment in cash or in bonds of a new issue. Whatever money was paid down was furnished and paid by Smith, Stephen, Kittson, and Hill. They took title in their own names, and bought the bonds in order to use them in the purchase of the mortgaged property when it should be sold under decrees in the various foreclosure suits.

In May, 1879, the defendants Kittson and Hill, together with Smith and Stephen, organized the defendant the Manitoba Co., for the purpose of acquiring, holding and operating the various lines of railroad and the other mortgaged property, when offered for sale under foreclosure decrees.

In March and April, 1879, foreclosure decrees were entered in all the suits, under which decrees all the mortgaged property was sold to the Manitoba Co., in June, 1879, all the bonds bought by Smith, Stephen, Kittson and Hill being used in part-payment, and those gentlemen also furnishing the cash needed and used as part of the purchase price.

The entire property thus bought comprised over 500 miles of railroad in Minnesota, with its equipment and land grant, worth (as stated in the bill) over $23,000,000. The Manitoba Co., soon after its purchase, issued and negotiated its mortgage bonds to the amount of $8,000,000, out of the proceeds of which it paid for the old bonds purchased by Smith, Stephen, Kittson and Hill, and all expenses.

The capital stock of the Manitoba Co. was fixed at $15,000,000, in $100 shares, and is worth par. Of this stock 57,646 shares were issued to Kittson and Hill. Besides this stock, other large profits have been realized from the operation of the lines and sale of lands, and have been divided among Smith, Stephen, Kittson and Hill.

The plaintiff brings this suit to establish a right to one-sixth of these profits—including one-sixth of the $15,000,000 capital stock of the Manitoba Co.

## II.

Clearly, the facts above stated, standing alone, afford no ground for any such claim. The defendants, with others, bought bonds in their own names and with their own money and credit. They organized the Manitoba Co., and, as such corporation, they bought and paid for the mortgaged property with their own money and with the bonds before purchased by them. They made a large and a legitimate profit, and as yet no more reason appears why they should divide with plaintiff than with all the citizens of the United States.

The plaintiff, however, sets forth *an alleged contract* by which, as he claims, he acquired a right to the share in the profits which he is seeking to obtain. On that contract all his rights depend. Without the contract he has no rights; and *this suit is a suit founded entirely on the contract*, and is brought for a specific enforcement—to obtain *in specie* the property which, as plaintiff says, it was agreed he should

have. And as his case must rest on his contract, it necessarily follows that if, for illegality, or want of consideration, or any other cause, his alleged contract is void or is not enforceable, he has no claim on the defendants, and is entitled to no relief.

This contract alleged to have been made by plaintiff with Kittson and Hill, is thus stated in folios 53–56 of the amended bill, pages 18 and 19 of the record.

The plaintiff there says (Page 19, fols. 55–6,) that in 1876, (three years after he became receiver:)

"He had knowledge not possessed by any of the other parties as to the whereabouts and situation of said bonds, the rated value thereof by the holders, the mode whereby and the channel through which the same could be reached and procured, also *in respect to the situation, amount, character and value of the lines of railroad and property* mortgaged to secure said bonds, and *in respect to the pending suits for the foreclosure of said mortgages*, and that the services of your orator in respect to all of said matters, and his co-operation, were indispensable to the success of said enterprise."

This "enterprise" was the purchase of the mortgage bonds *and the acquisition of the mortgaged property, by means of the bonds so purchased.*

Having this special knowledge, and wishing to trade upon it to his own profit, the plaintiff says (p. 18, fol. 53,) it was agreed between himself and the defendants Kittson and Hill:

"That they would jointly undertake, for their joint, mutual and equal interest, benefit, advantage and profit, to acquire by purchase or contract all the bonds possible to be obtained of" (the First Division Co. and the St. Paul & Pacific Co.,) "which bonds had theretofore been issued by said respective companies, and were outstanding and for sale by the holders thereof at a large discount, and were secured by mortgages upon the lines and other property of said companies, and which mortgages were then in process of foreclosure in five several suits in courts in said state for default in the payment of the interest upon said bonds."

The plaintiff proceeds (fol. 54, p. 19) to state the ultimate purpose of the parties:

"That *the understanding, object, purpose and agreement of said parties in acquiring said bonds was to become the purchasers of said lines of railroad and other mortgaged property when offered for sale under decrees for the foreclosure of said mortgages, and to turn in and use said bonds in payment or part payment therefor, and thereby, through and by means of said bonds, acquire said lines of railroad and other property.*"

After stating that Mr. Kittson represented that he could procure the necessary funds from Smith and other Canadian capitalists, and what interest in the enterprise should be given them, and that the interest retained should be divided equally between plaintiff, Kittson and Hill, the amended bill further states (fol. 55, p. 19) that—

"It was also then and there further agreed by and between your orator and said Kittson and Hill that the details of *the negotiations* for procuring the necessary funds and *for the purchase of said bonds should be* principally *conducted and managed by the said Kittson and Hill*, and such person or persons as an interest in said enterprise should be given to for furnishing funds therefor, *and that your orator should furnish such facts, information and advice, and render such aid and assistance therein from time to time as should be required of him.*"

And then follows the statement already quoted as to plaintiff's peculiar knowledge, which explains what "facts, information and advice," the plaintiff says he expected and agreed to give.

That the alleged agreement and "enterprise" contemplated the acquisition of the mortgaged property as well as the mortgaged bonds, is further shown by the following averments in the amended bill, (p. 20, fol. 57:)

"Said purchases (of bonds) were made *by and in name of said Smith, Stephen, Kittson and Hill*, but *for the purpose and with a view to their use in the purchase of said lines of railroad* and other mortgaged property when offered for sale

under foreclosure decrees, and *under and in pursuance of the agreements* and understandings *between your orator and the said Kittson and Hill* hereinbefore stated in respect thereto."

And again, (p. 20, fol. 59:)

"It was the understanding on the part of all said parties that *as soon as said lines of railroad* and other mortgaged property *should be acquired by them* under said decretal sales, a new issue of bonds should be made," etc.

And again, (p. 22, fol. 63,) the plaintiff says that the Manitoba Co. was organized by Smith, Stephen, Kittson and Hill, for the purpose of buying the mortgaged property at the decretal sales, "for the use and benefit of the said parties interested in the purchase of said bonds as aforesaid."

And again, (p. 24, fol. 69:)

"That a large amount of the said capital stock of said railway company has been issued by said company * * * and that the said railway company has delivered to the said Kittson and Hill 57,646 shares thereof, * * * *being a portion and part thereof to which your orator and the said Kittson and Hill are entitled under and pursuant to the said arrangement made with said Smith and Stephen in connection with said enterprise.*"

And other averments of the bill are to the same effect. (See pp. 22–3, fols. 65, 67.)

We have gone thus into detail on this point, because it was argued in the circuit court that the agreement on which the suit is based was merely an agreement *for purchasing the bonds*, and *not* an agreement *for the acquisition of the property by means of the bonds*, and that it was therefore not open to the objections there made to it. See opinion of *Treat*, J., in Record, p. 37, fol. 107.

In averring plaintiff's performance of the agreement on his part the amended bill states, (p. 20, fol. 58:)

"That throughout said negotiations for the purchase of said bonds, and in the purchases thereof, your orator was

continuously called upon by the said Kittson and Hill for facts and information, advice and co-operation in respect thereto, and at their request rendered the same pursuant to the aforesaid agreements and understandings between them; and that said negotiations were only successful through and by means of the advice and co-operation of your orator, and the facts and information peculiarly within his knowledge as aforesaid, and imparted by him to the said Kittson and Hill, at their request, under said understandings and agreements as aforesaid."

It seems plain enough (in view of plaintiff's position as receiver of one line and general manager under the trustees of the other) that *plaintiff's alleged agreement was to be and was kept secret from the court and from his cestuis que trust.* This is the fair inference from the passages underscored in our extracts from the bill, and is clearly shown by the plaintiff's own testimony on cross-examination, (Record, pp. 44–46, and especially questions 5, 6, 13, 16–19, 25–27,) and by Judge Dillon's order, Exhibit B., par. 2; Record, p. 48.

In his original bill (Record, pp. 1–8) the plaintiff omitted to state that he was receiver or general manager and thereby escaped a demurrer. These facts were, however, set up by plea to the original bill, (pp. 15–16,) and in his amended bill, (p. 21, fol. 60,) while he admits that he was at one time receiver and general manager, the defendants deemed it proper to present, by plea, a particular statement of the facts.

In this plea they say that they ought not to be required to answer the bill, *for the reason that the alleged contract, on which the plaintiff's case is based, was illegal because in violation of his trust as receiver and general manager, and a fraud upon the court and the bondholders.*

(Record, pp. 32–3, fols. 92–3.)

## ARGUMENT.

There are three and but three questions presented by this record—

1.

*What is the scope and meaning of the contract which plaintiff alleges in his bill?*

2.

*Was that alleged contract, when it was made, a valid contract, or was it illegal and utterly void?*

3.

*If the alleged contract was illegal and void in its inception, and a mere nullity, can the plaintiff nevertheless maintain this bill for an accounting and division of the profits resulting from the execution of the provisions of that void and illegal contract, between the alleged parties to it?*

These questions will be discussed in their order.

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### FIRST.

*What is the scope and meaning of the alleged contract?*

This contract clearly contemplated and provided—

1. For a purchase not merely of the mortgage bonds, as an end in itself, but for a purchase of the mortgaged property by means of the bonds.

This is apparent from the passages already quoted and italicised in our statement of the case, *supra*.

2. That plaintiff's sole contribution to the enterprise—

*the only consideration for the promises of defendants*—consisted of the "knowledge, information and advice," which, by reason of his position as receiver of one line and general manager for the trustees in possession of the other line, he was able to and agreed to furnish to the defendants Kittson and Hill.

3. The agreement also contemplated and provided that these purchases should be made in the manner they were actually made—that is, in the names of persons other than the plaintiff.

And it contemplated (and this was, and was considered by the parties, essential to the success of the "enterprise,") that the plaintiff's interest in the purchase of the bonds and in the purchase of the mortgaged property should be kept secret alike from the court and from the stockholders and bondholders of the two companies.

And the concealment thus agreed on was actually practised.

Testimony of plaintiff, in Record, pp. 41–2, 44, 45, 46–7.

And if the agreement merely contemplated a purchase of the bonds, and not a purchase of the mortgaged property by use of the bonds, or if the transactions which took place were not those agreed upon, then the profits realized are not the fruits of the contract, and are not recoverable as such or at all.

If the agreement contemplated a purchase in the name of all the parties, without concealment of plaintiff's interest, then the purchase made by defendants in their own names, and with their own funds alone, was a purchase for their own benefit alone, and not for the joint use of themselves and plaintiff; a purchase not under, but in derogation and repudiation of the contract; a purchase which might subject the contracting parties to an action for damages for breach

of contract, but would give the plaintiff no interest in the bonds or the railroad purchased, or in any profits accruing from the purchase.

*Farley* v. *Kittson*, 27 Minn. 102, (—The first of the suits brought by plaintiff, each with a different version of the alleged contract.)

"If two agree to purchase, and one furnishes all the money and takes the title to himself, no trust results to the other."

1 Perry on Trusts, § 133.

If the plaintiff has any case in this suit, on his own theory, it is because the purchase of the bonds and the property by the other associates in their own names or that of the Manitoba Co., was the very purchase originally agreed to be made —that is, a purchase in which they alone should be the ostensible buyers, and plaintiff's interest should not appear.

## SECOND.

*Was the contract alleged in the bill a lawful and valid contract in its inception, or was it illegal and utterly void?*

We submit that it was illegal and utterly void, because made (1) upon an illegal consideration, and (2) for an unlawful purpose.

THE MAKING OF THE ALLEGED AGREEMENT CREATED A DIRECT CONFLICT BETWEEN PLAINTIFF'S OBLIGATIONS AND INTERESTS THEREUNDER AND THE FIDUCIARY DUTIES HE OWED TO THE COURT WHOSE RECEIVER HE WAS, AND TO THE BONDHOLDERS AND STOCKHOLDERS INTERESTED IN THE PROPERTY IN HIS CHARGE AS RECEIVER AND GENERAL MANAGER. THE AGREEMENT WAS IN ITSELF A BREACH OF TRUST. IT CONTEMPLATED AND PROVIDED FOR THE CONCEALMENT FROM THE COURT OF PLAINTIFF'S INTEREST IN THE SCHEME TO BUY THE BONDS AND THE MORTGAGED PROPERTY, AND NECESSARILY TENDED TO THE COMMISSION OF OTHER FRAUDS AND BREACHES OF TRUST.

SUCH AN AGREEMENT IS AGAINST PUBLIC POLICY AND UTTERLY VOID, AND CAN GIVE RISE TO NO RIGHTS WHATEVER.

### I.

The obligations and interests of the plaintiff under the agreement are clearly defined. He was possessed of peculiar knowledge of the "whereabouts and situation of the mortgage bonds, the rated value thereof by the holders, the mode whereby and the channel through which the same could be reached and procured," and also of "the situation, amount, character and value of the lines of railroad" and other mortgaged property, and of "the pending suits for the foreclosure of said mortgages." He was able to give to the other parties "facts, information and advice," and to render "services in respect to all of said matters," in carrying out

the scheme, which, as he says, "were indispensable to the success of said enterprise." By the terms of the agreement plaintiff was to furnish no money—that was to be furnished or procured by the other parties, who were to conduct the negotiations for the purchase of the bonds, and to purchase them in their own names, and to buy the mortgaged property in the name of a company to be organized by themselves alone. Plaintiff, on the other hand, was to "furnish such facts, information and advice and render such aid and assistance," *not* as he in his fiduciary position might lawfully render, but "as should be required of him" by the other parties. This was to be the capital on which he traded, and which was to be his sole contribution to the "enterprise." In return for this investment of his knowledge, his advice and his services, plaintiff was to receive an equal share with the other parties to the agreement in the profits of the enterprise —profits which he alleges amounted to upwards of $15,00 ,-000.

And the plaintiff's connection with the "enterprise" of buying first the bonds, and secondly, and by means of the bonds, the mortgaged property in his charge as receiver and general manager, was to be and was kept secret from the court. And on plaintiff's own evidence he never divulged to any one his interest in the scheme. His own testimony shows that *after* the purchase from the Dutch committee had been completed, he informed Mr. Kennedy *not* that he was interested in the scheme, still less that he had been interested from the beginning and throughout the negotiations that had just been closed, but merely that he had been *offered* an interest. And he says he put it in this way to deceive Mr. Kennedy. And his own testimony as to later conversations shows that he never told Mr. Kennedy that he had made an agreement in which he traded on his position as receiver, and was to furnish no money, for he says that Mr. Kennedy advised him "to ascertain how much money it would be necessary for me

to raise to carry out the project," Mr. Kennedy evidently believing that plaintiff still had the "offer" under advisement.

(Record, p. 42, Q. 12.)

II.

Such being the things which plaintiff was to do and to receive under the agreement, what were his duties to the court and the bondholders and stockholders? Wherein did his obligations and interests under the agreement conflict with those duties? What opportunity did his position as receiver and general manager furnish for the commission of frauds upon the court and the stockholders and bondholders? And what temptation did his obligations and interests under the agreement hold out to him to deceive and defraud the court and the bondholders and stockholders?

These are material questions, for agreements are held void as against public policy which *tend* to the commission of breaches of trust and frauds, BY FURNISHING A TEMPTATION to commit them, as well as agreements which expressly provide for and are followed by acts of fraud.

A.

As to plaintiff's duty to the court—

1. He owed the court *fidelity*. The court had undertaken the delicate and responsible duty of operating a line of railway until it should be sold under decree of foreclosure. It was the duty of the court to manage this property, not in the interest of any one bondholder, or any set of bondholders, nor, indeed, in the interest of all the bondholders, if those interests conflicted with the legitimate rights of stockholders or others,—but in the interest of all concerned in the property.

And the court had a right to require that the receiver through whom it was managing the property should manage

it in the interest of all, and not in the interest of himself and associates; and more than this, the court had a right to require,—it was the court's duty to require,—that its receiver should keep himself aloof from any temptation to sacrifice the interests entrusted to his charge to his own personal interests. The court had the right to require, and the plaintiff owed it to the court, that he should make no agreement by which he should expose himself to any such temptation.

He owed it to the court that he should do nothing to the discredit of the court—nothing that would bring the court or its administration of the trust, or the administration of similar trusts by the same or other courts, into suspicion or contempt.

2. He owed it to the court and to the parties that he should be *entirely disinterested*. It is part of the definition of a receiver that he is an "indifferent person." *Booth* v. *Clark*, 17 How. 322, 331. "The receiver is the officer and representative of the court, having in his character of receiver no personal interest but that arising out of his responsibility for the correct and faithful discharge of his duties." *Beverley* v. *Brooke*, 4 Grat. 187, 208. It was his absolute duty to refrain from making any agreement, open or secret, which should make him other than disinterested. Any such agreement would be, in the very making of it, a violation of this duty.

3. He owed to the court *entire candor*.

The receiver is not merely the arm to execute the orders of the court. The judges, while they assume the charge and operation of railways, are not experts in railway management, nor can they possess the intimate acquaintance with the property or its earning capacity which would enable them to know its value, or even to know if it was operated faithfully or to the best advantage. In all these matters the court must depend on the receiver. And when the final decree is entered, and a sale is to be made and confirmed, the court

has the right to look to its receiver for information that will enable it to determine in what manner or in what parcels the sale had best be made, and whether the price realized be such that the sale should be confirmed. It has a right to require of the receiver that he shall furnish to the master making the sale truthful particulars for his advertisement of it, and to intending bidders truthful information upon which they may act in bidding on the property, and that he shall have no interest and be under no temptation to conceal or pervert the truth.

And the court has the right to require, not only that the information and advice it may receive or seek from the receiver shall be truthful and disinterested, but that the receiver shall be under no temptation to make it otherwise. And it has the right to know whether it is receiving such advice and information from a receiver whose only motive and whose only interest are identical with its own—that is, to administer the property with a single eye to the benefit of the *cestuis que trustent*—or whether the receiver is interested in the purchase of the bonds or of the mortgaged property, and so possessed of interests antagonistic to those of the court and the *cestuis que trustent*, and hence incapable of disinterested action.

Hence it was the absolute duty of the plaintiff to inform the court of his obligations and his interests under the agreement upon which he sues.

B.

As to plaintiff's duty to the bondholders and stockholders.

This of course was to manage the property to the best advantage—so as to keep it in good condition and make it productive. Faithful management would tend to enhance its value and the *intrinsic* value of the bonds, at least, if not of the stock. And truthful reports of the results of such

management would tend to enhance the *market* value of the bonds.

And upon those reports—upon information derived from the receiver, in case of one line, and from the general manager, (either directly or through the medium of the trustees,) in case of the other line, the bondholders must necessarily rely for information on which to estimate the value of their bonds. And they had a right to require, and the receiver and general manager owed it to them, that the management of the roads should be faithful and disinterested, and that reports of their earnings, expenses, condition and prospects should be furnished, and should be truthful and disinterested, and that the receiver and general manager, in his management, and in the reports and information furnished by him, should be under no temptation to make them other than disinterested and truthful. And when some of them were negotiating a sale of their bonds, they had a right to know whether one of the buyers was the receiver and general manager.

And when a decree for sale should be entered, the bondholders and stockholders and intending bidders had a right to require that the receiver and general manager, having more intimate and exact knowledge than any other man, of "the situation, amount, character and value of the lines of railroad and property mortgaged," should furnish to the officer making the sale, and to intending bidders, full, truthful and accurate information on all matters connected with the property which might affect its selling value. And they had a right to require, and he owed it to them, that he should not, by reason of his being, openly or secretly, engaged in a scheme to buy at the sale, or for any other reason, be under any temptation to withhold or falsify information so as to deter bidders, or check competition, or prevent the full value of the property from being realized at the sale.

## III.

Wherein did the plaintiff's obligations and interests under his alleged agreement conflict with his duties to the court, and to all persons interested in the property in his charge as receiver and general manager?

What opportunity did plaintiff's official position furnish for the commission of frauds upon the court and upon his *cestuis que trustent*, whether bondholders, stockholders or others?

What temptation did plaintiff's interests under his alleged agreement hold out to him to be unfaithful to his duties to the court and to his *cestuis que trustent?*

These questions will be considered together.

### A.

His duty to the court was to inform it at once and fully of the agreement he had assumed to make, and of the interests and obligations which he thereby assumed to acquire and undertake. It was his manifest interest under the agreement to conceal it. There can be no question but that a disclosure or discovery would have been followed by the consequence he says he feared—his own immediate removal from office. No court that had assumed and was discharging the duty of operating a railway by its receiver would, after such a disclosure, retain in office a receiver confessedly unfitted for his trust.

His removal from office besides involving the loss of his lawful emoluments, would in effect have defeated the entire "enterprise"—if the statements in the bill are to be credited. And even if the others had been able and willing to carry out the enterprise without his secret aid as receiver,—after the withdrawal of his capital from the joint stock,—still the

plaintiff, having drawn out his capital, could not expect to share in the profit of an enterprise to which he had no longer anything of value to contribute.

His duty to the bondholders and to the stockholders also was to disclose the alleged agreement, while his interest was to conceal it. His position of general manager with its legitimate profits would, as he says he feared it would, be lost to him, and a receiver of the First Division lines would be appointed.

His duty to the court and the bondholders was to manage the property with such fidelity, and render such truthful reports and information of its earnings and condition, that the market value of the bonds, and "the rated value thereof by the holders," would be enhanced beyond any valuation based on faithless management, or untrue reports of the results of honest management. And in like manner faithful management and honest reports would enhance the selling value of the mortgaged property, and tend to produce higher bids for it when offered for sale under the decree.

But his interest as buyer of the bonds and of the property was to depreciate the selling value of both, and hence it was his interest to reduce its earnings by mismanagement, or to give false information and reports, concealing or disparaging any profitable results, whether such profits followed upon faithful or faithless management. *Emptor emit quam minimi potest.*

In short his duty required fidelity and honesty. His interest would be served by faithlessness and deceit.

B.

The plaintiff was in a position enabling him, if he so desired, to deceive alike the court, the bondholders and stockholders, and bidders at the decretal sale, not merely as to his interest in the enterprise he had undertaken, but also as

to the condition, earnings, business, and prospects of the railroads, and as to the value of the property and of the mortgage bonds.

C.

And he was under a temptation such as few men have been tried by, to sacrifice to his personal interests the duties he owed alike to the court and his *cestuis que trustent*. On the one hand were honor, duty, and the moderate salary of a receiver and manager; on the other, "the possibility of wealth beyond the dreams of avarice." He says that his two associates were required to promise one-half the net profits to the persons whom *they* procured to join in the enterprise and help furnish the needed money, and that one-third the residue—one-sixth of the entire profits—was to be his share. He says in his bill that those profits exceeded $15,000,000, his share being at least $2,500,000. What wonder that so dazzling a temptation should blind him to considerations of honor and duty. Not since Lord Clive stood in the ancient treasure-house of Bengal has a trap for honor and virtue been set with so glittering a bait. And if plaintiff's statement is to be believed, if he really made the agreement sued on, and if in his after conduct he was guilty of no fraud, no breach of trust, other than in concealing the agreement from the court, he may well, like Clive, stand astonished at his own moderation.

But it was just because the temptation was so overwhelming, the profits to accrue from yielding to it so enormous, that the law forbade him to face it, commanded him to put it behind him, to flee from it. It will be seen in cases to be cited that a contract by which a man places himself where his interest tempts him to a breach of good faith, is utterly void, though the temptation is measured by the inconsiderable sum of $10,000, or the paltry one of $20. How much greater the need that the "sting of disability" should be put

into the temptation when it is such as the sternest virtue can hardly be expected to withstand.

D.

In regard to the duties of one in plaintiff's position, his opportunities and temptations, and the disabilities which the law imposes as a protection against those temptations, valuable observations will be found in cases in the Irish chancery, quoted in another part of this brief. And on the same subject the views expressed by the Supreme Court of New Hampshire in *Ashuelot R. Co.* v. *Elliot*, 57 N. H. 397, may be read with profit.

Defendant had been and was in possession of plaintiff's railroad, as trustee in a mortgage which the suit was brought to redeem. Among other things the plaintiff asked for an account of the moneys in defendant's possession as trustee, and that he be charged with the profits he had made on $46,000 of the mortgage bonds which he had bought while in possession as trustee.

His purchases were made in his own name, in open market; and it was expressly found (p. 412) that he "did not mismanage the trust property for the purpose of depreciating the price of the bonds."

The court charged him with the profits, and, in regard to his duties to the bondholders, *Ladd*, J., says, (pp. 431–2:)

"He must manage the property judiciously, according to his best skill, in order that its earnings may go as far as possible toward paying the debt. Of course, prudent and efficient management of the property would have a tendency to maintain the credit of the corporation and enhance the market value of the bonds; and this much he was bound to do, not especially because it may have the effect indicated, but because such is the obligation imposed by the trust he has undertaken."

And, speaking of his duty to the corporation and its stockholders, the same judge says, (pp. 433–4:)

"By accepting the position and entering upon the active performance of its duties, he took upon himself an implied obligation to protect and preserve the interests and rights of the corporation, just as much as he did to enforce the rights of the bondholders under the mortgage, nor were his duties to these parties really at all repugnant or incompatible. With respect to the management of the property, which was in reality the main thing to be attended to, their interests were identical. The legal interest of the bondholders was that the bonds should be paid; the interest of the mortgagors was clearly the same. Each interest alike called for a wise and efficient management of the road. * * * Any act done by him in this situation of things whereby his own private interest as an individual should be brought into antagonism and hostility to the interests of the mortgagors, would, in my judgment, be just as much a renunciation of his implied obligation to them, just as much a breach of the duty and trust he had undertaken on their behalf, as would an act bringing his individual interest into hostility to those of the bondholders be a breach of his duty to them."

After deciding that the trustee's purchase of $46,000 bonds "was not compatible with the duty he owed the corporation in the performance of his trust under the mortgage, and that he ought in equity to account to them for the profits realized in that transaction," the court adds (p. 437:)

"It need not be said that to hold a different rule would be to hold out the most direct encouragement to trustees in such a situation to mismanage the property for the purpose of depreciating the bonds in the market, so that they may be able to buy them for less than their actual worth."

And again:

"I think Mr. Elliot's duties to the Ashuelot Railroad Corporation and its stockholders assumed the character which should forbid a purchase for his own immediate gain the moment he took possession of the property under the deed; and in the absence of all bad faith and actual wrongful intent, I think he should not be held to account for profits on bonds owned by him at that time; but as to the $46,000 purchased afterwards he should be held to account for the profits actually realized."

And *Foster*, C. J., says, (p. 440:)

"It must be conceded that his (Elliot's) relations to all the parties were of a fiduciary character, and were very close, intimate and confidential."

And (p. 441:)

"There was no point of time and no status of position, in which, as to the mortgage creditors or the mortgage debtors, he could be permitted to make the interests of either party subservient to those of himself as an individual, without violating the fundamental principles which were established for the protection of those who place faith and confidence where faith and confidence are invited and accepted. * * *

"When Elliot took possession of the road for the bondholders, he was charged with the duty to enforce their claims and protect their rights strictly and faithfully. Their rights were to have their bonds paid or the mortgage foreclosed for their benefit. His duty as mortgagee in possession was so to manage the property as to make it most available for the payment of the bonds. And the more prudently it was managed, the more were the bondholders benefited by the preservation and enhancement of the value of their securities.

"In so far as prudent management of the road tended to enhance the value of the bonds by sustaining the credit and value of the security, so far the market value of the bonds was increased, and holders could hold or sell at advantage. In so far as the road might be impaired by bad management, so far the market value of the bonds would be diminished, and holders would hold or sell at a disadvantage. His duty to the bondholders, then, required him by all fair and upright means—fair and upright towards the debtors as well as the creditors—to maintain the price and value of the bonds."

## IV.

Clearly, then, by entering into any agreement—*open* or *secret*—for the purchase of the mortgage bonds or the mortgaged property, or both, a railway receiver or general manager for mortgage trustees in possession places himself at once in a position where his personal interests are antagonistic to those of his *cestuis que trustent* and to the duties he owes to them and to the court; where he has the opportu-

nity, afforded by his office, to sacrifice, to a greater or less extent, those interests to his own; and where he at once becomes subject to a temptation to make that sacrifice—a temptation greater or less, according to the amount of his interest and of his expectation of gain under the agreement.

V.

In the very leading case of *Fuller* v. *Dame*, 18 Pick. 472, (a case often cited with approval by this and other courts of high repute,) the facts were these.

The Boston & Worcester R. Co. was about to be constructed into the city of Boston — its easterly terminus. Dame was the owner of a large tract of land upon or near a part of which, to enhance its value, he desired the company to fix its terminal freight stations, etc. In order to accomplish this, it was believed to be necessary to form a company which should purchase a large tract of land and make to the railroad company large donations of money and land to secure the desired location.

The plaintiff Fuller was a stockholder in the railroad company.

On October 1, 1832, the parties made an agreement reciting Fuller's belief that the public good and the good of its stockholders required that the railroad company should fix its terminus in the locality desired by Dame, and by which Fuller agreed that he would aid Dame in forming his proposed company, and in causing the railroad company to fix its terminal buildings and grounds in the locality desired. And Dame agreed that a note for $9,600, then made by him and payable three years thereafter to Fuller's order, and lodged with C. & M., should be delivered to Fuller when the railroad company should have fixed its freight house in the desired locality, and that such note, being so delivered, should be paid to Fuller according to its tenor. At the

same time Dame paid Fuller $400 in cash on the same account.

A company was formed known as the South Cove Corporation, of which Fuller became a member. The project was carried out, to the very great profit of Dame in the enhanced value of his lands.

Fuller having received and sued on the note, evidence *pro* and *con* was offered as to the extent and value of Fuller's services, but was excluded as immaterial and irrelevant.

In delivering the judgment of the court in favor of the defendant, Chief Justice Shaw said, (p. 479:)

"The court are of opinion that this contract was obviously contrary to public policy, to open, upright and fair dealing, and cannot therefore in point of law be supported."

(P. 481.) "The court are of opinion that this does not stand upon the ground that the promise is void because it was given to induce the person to whom it was made to do an unlawful act. *It is an undoubted principle of law that where a promise is made to one in consideration of doing an unlawful act, as to commit an assault* or *practise a fraud on a third person, the promise is void in law.* It was strongly pressed by the counsel for the plaintiffs that when a contract is made in general terms, broad enough to include things lawful and unlawful, it shall be presumed that they intended those only which were lawful. * * * It should be presumed that the lawful and not the unlawful means were intended. If this defence were placed solely upon the position that this was a contract void on the ground of containing stipulations to do unlawful acts, this would be a cogent and perhaps an unanswerable argument in reply.

"But this is not the true nature of the defence. *The law goes further than merely to annul contracts where the obvious and avowed purpose is to do or cause the doing of unlawful acts. It avoids contracts and promises made with a view to place one under wrong influences—those which offer him a temptation to do that which may injuriously affect the rights and interests of third persons.*"

And after instancing agreements whereby one for pay agrees to solicit a will or advise a marriage, the court says, (p. 482:)

"This is founded upon the general consideration of fitness and expediency. Such advice and solicitation, in whatever form the agency may be exerted, are understood to be disinterested, and to flow from a single regard to the interest of the parties. They are lawful only so far as they are free and disinterested. If such advice and solicitation, thus understood to be pure and disinterested, may be justly offered from mercenary motives, they would produce all the consequences of absolute misrepresentation and falsehood. It is understood to be the offer of disinterested good offices, and the measure proposed, to be recommended by the unbiased judgment of the person offering it; whereas it is in fact an offer flowing from unavowed motives of pecuniary interest, and the recommendation is the result of a judgment biased by the hope of a large reward. If rewards might be taken in consideration of the exertion of direct or indirect influence, either by the person acting under it or by others who should be influenced and moved by him, it would destroy all confidence, it would lead to false and unfair representations and dealings, and be productive of infinite mischief.

"The case in question is, we think, clearly within the operation of this salutary principle. Without considering other aspects of the contract, we are of opinion that it was contrary to public policy and to upright and fair dealing, (1) as it tended injuriously to affect the public interests in establishing the fittest and most suitable location for the termination of the Worcester railroad for the accommodation of the public travel; (2) As it affected the interests of the proprietors of the Worcester railroad; (3) As it affected the interests of the joint-stock company incorporated under the name of the South Cove Corporation."

After speaking of the public character of the railroad and the public interests involved in the location of its terminus, and adverting to the fact that though not one of the directors with whom it lay to fix the terminus, Fuller was a stockholder and hence an elector of directors, and that "the election might depend on the known views of candidates on this very question of location," and after saying "they had a right to his disinterested judgment and advice upon the question of location, and this could not be exercised whilst he held and relied on a promise for a large sum of money, the pay-

ment of which depended on the decision of this question by the directors"—the judge proceeds, (p. 484:)

"2. It was contrary to public policy and the principles of fair dealing as it affected the private interests of the two companies. Mr. Fuller was one of the original proprietors of the Worcester railroad. His associates had a right to believe that in all his acts as such stockholder, in choosing directors, in framing by-laws, and doing other acts pursuant to the powers of the corporation, he had a common, and, in proportion to his shares, an equal interest, and they had a right to rely on his judgment, his recommendations of directors, and other acts, with all the confidence inspired by such a belief. *A contract assuring him separate and distinct advantages operated to mislead and deceive them and thus had a tendency to operate as a fraud upon them.* It is not easy to distinguish this from the case of a composition deed, where, ostensibly, all the creditors stipulate to release the common debtor upon the payment of their debts at a certain rate of discount; any stipulation for a separate and distinct advantage is held to be a fraud upon other creditors and void. *Case* v. *Gerrish*, 15 Pick. 49.

"3. The same considerations apply to the case of Mr. Fuller as a member and stockholder in the South Cove Corporation. * * The members of this company had a right to have the question whether they should contract with the Worcester Railway Corporation, and the terms on which they should so contract settled and decided by a sole regard to the interests of that corporation as a company of owners, purchasers and adventurers. *Any influence from any quarter, created by the promise of a sum of money, to induce them to so contract, and to yield to particular terms, with a view to separate and extraneous interests, operated as a fraud upon them and rendered such promise void.*"

And the judge further says, (p. 485:)

"*We are aware that there is no stipulation in this contract that it should be kept secret. There is certainly no intimation that it should be disclosed to either of these companies, or otherwise made public. The contract was of such a nature that it would be likely to defeat its purpose to make it public. It is therefore reasonable to presume that it was not intended to be made public.* In point of fact it does not appear that it was known to any one but the parties interested and the deposit-

aries of the note and agreement until after the object was accomplished. *But it is enough for the purpose of the present argument, which goes to establish a general rule, that such agreement might be kept secret from all those on whom the influence was intended to be exerted, and that in general it would be for the interest of the parties to keep it secret, and thus that it would be productive of all the injurious consequences alluded to.*"

## VI.

This case of *Fuller* v. *Dame* is direct authority for these propositions.

*1. A promise or contract, the making of which places one in a position of temptation to deal unfairly with other persons, is against public policy and is a void and illegal promise.*

*2. Such promise being void and illegal is not sufficient consideration to sustain a contract, and a promise or contract upon such a consideration is itself void, and illegal also.*

## VII.

Lest it should be urged that the morality of *Fuller* v. *Dame*, (and hence the law based upon it,) is a survival of strait-laced Puritanism, belongs to a narrow section and a past generation, and is unsuited to the expanded trade, the liberal culture and the broader life of the country at large in these latter days, we subjoin some typical instances selected from a great mass of cases exhibiting the frailty of humanity in situations of temptation, which at once vindicate the need and the wisdom of the doctrine and the rigor with which it has been enforced in England, in the States of the Union from New England to California, and in this court.

Having stated these cases, we propose to show from them not merely that the agreement alleged by plaintiff was illegal and utterly void in its inception and in the making of it, but also that the third principal question in this case must be answered in the negative—that is, if the agreement alleged by

plaintiff was illegal in its inception, this suit cannot be maintained—a result which, when attained, will, we trust, be our ample justification for this "grand larceny upon the digests."

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In *Harrington* v. *Victoria Graving Dock Co.*, 3 Q. B. Div. 549, the case was this: Defendant, having made tender for repair of ships of the Great Eastern Ry. Co., contracted to pay plaintiff a commission for superintending such repairs. Plaintiff was the Great Eastern Co's advisory engineer as to the repairs, and part of the consideration of defendant's promise was plaintiff's promise to use his influence with his company to get defendant's tender accepted.

The action was for a balance of commissions for superintending the repairs, which had been executed.

The jury found that the contract, though calculated to bias plaintiff's mind, had not in fact done so, and that he had not given less beneficial advice to his company than he would otherwise have done.

*Held*, that the contract was void because of its corrupt consideration.

"*Cockburn*, C. J. Our judgment must, in my opinion, be for the defendants. I will assume, for the purposes of argument, that the agreement did not influence the mind of the plaintiff so as to induce him to do anything dishonest towards his employers, the Great Eastern Railway Company. I entertain no doubt, however, that when a bribe is given, or a promise of a bribe is made, to a person in the employ of another by some one who has contracted, or is about to contract, with the employer, with a view to inducing the person employed to act otherwise than with loyality and fidelity to his employer, the agreement is a corrupt one, and is not enforcible at law, whatever the actual effect produced on the mind of the person bribed may be. *The tendency of such an agreement as this must be to bias the mind of the agent or other person employed, and to lead him to act disloyally to his principal.* It is intended by the party who promises the bribe to have that effect, and the other party knows such is his inten-

tion. Such a bargain is obviously corrupt. *It would plainly be in contravention of the maxim, ex turpi causa non oritur actio, and most mischievous, to hold that a man could come into a court of law to enforce such a bargain on the ground that he was not in fact corrupted. It is quite immaterial that the employer was not in fact damaged. It is sufficient that the consideration upon which the promise was made was intended to be a corrupt one.*

"*Mellor*, J. I am of the same opinion. It is not because the agreement failed to have the effect which it was intended to have in corrupting the plaintiff's mind that therefore it can afford the basis of a good cause of action. *It would be most fatal if it were open to a person who had entered into an agreement that he knew was designed to induce him to act unfaithfully to his employer, to allege that it had not in fact had that effect, and to recover upon it on the ground that the employer had not been damaged.*

"*Field*, J. I am of the same opinion. I am very glad that we have an opportunity of distinctly declaring the law upon this point, which was left undecided in the case of *Smith* v. *Sorby*. The present case affords an instance how sadly loose commercial practice has become in respect to transactions of this nature. If the point we are now deciding has never been exactly decided before, it is most clearly within the principles laid down by the authorities on the subject. It really needs no authority to show that, even although the employers are not actually injured, and the bribe fails to have the intended effect, a contract such as this is a corrupt one, and cannot be enforced."

In *Bollman* v. *Loomis*, 41 Conn. 581, the defendant, a piano-dealer, hired plaintiff to induce R., who relied on plaintiff's judgment, to buy of defendant a piano which both R. and plaintiff had already examined, and which plaintiff, an expert, had pronounced a good one. Plaintiff advised the purchase, and after it was made claimed his reward. Defendant at first denied any employment, but the parties finally agreed on $20 as the sum to be paid. For this sum plaintiff brought suit.

The court held the transaction void because "*inconsistent with fair and honorable dealing, contrary to sound policy, and offensive to good morals*," and says:

"The plaintiff may have said nothing as to this piano which he did not believe to be true, and the defendant may have obtained for it no more than it was worth. But the means resorted to to effect the sale deceived and misled the purchaser and was in violation of private confidence. Such contracts and acts are deemed equally reprehensible with positive fraud. *They are within the same reason and mischief as contracts made and done with an evil intent, and are therefore prohibited by law.*"

And the court goes on to quote from *Fuller* v. *Dame*, as to the unlawfulness of contracts which place one in a positon of temptation, and *tend* to the commission of frauds.

In *Byrd* v. *Hughes*, 84 Ill. 174, it was agreed by defendant, in consideration that plaintiff, the agent of T. and W., should induce them to discharge their attorney and appoint defendant in his place, defendant would divide with plaintiff the profits of the employment. Plaintiff's bill was for an accounting and division of the realized profits, alleged to amount to $300,000. A demurrer to the bill was sustained. The court say:

"*The complainant whose duty it was* to guard and protect the interests of Turner and Washington, whose agent he was, and to give them honest advice, and *not to place himself in a position where there would be a conflict between duty on the one hand and self-interest on the other, in utter disregard of these well-known and wholesome principles entered upon the task to induce his principals to discharge their attorney and employ, in his stead, the defendant.* What was the object? Surely not to enhance the interests of his principals, because he concedes they had in their service an attorney of skill and learning. But the sole object was that he might obtain one-half of all fees the attorney might earn in the transaction of his principal's business. * * *

"*We are aware of no principle of equity jurisprudence which would allow a court of equity to lend its aid to assist the complainant in the collection of fees earned under a contract based,* as this one is, *upon a consideration immoral and illegal.* A contract based on an illegal consideration could not be enforced in a court of law; much less will a court of equity, where a complainant is required to come into court with

clean hands, enforce the performance of a contract founded upon an illegal consideration."

In *Swan* v. *Chorpenning*, 20 Cal. 182, plaintiff, having put in a bid for carrying the mail, it was agreed between the parties that in consideration that plaintiff should withdraw his bid, and use his influence to get a contract for defendant over a longer route including that bid upon by plaintiff, the plaintiff should have an interest in such contract or an equivalent pecuniary compensation. Plaintiff had a verdict of $30,000 from which the defendant appealed.

After holding that "any agreement tending to deprive the government of the advantage of competition in the bidding is unlawful and void," quoting from *Gulick* v. *Ward*, 10 N. J. Law, 87, the court say, (p. 185:)

"It is contended that the particular circumstances of this case relieve the transaction of its illegal character; but we take a different view of those circumstances. The purpose for which the bid was to be withdrawn we do not consider material, nor do we regard as important the fact that the withdrawal resulted in no actual injury to the government. The agreement was entered into for the accomplishment of a project of which the government was ignorant, and whether or not the withdrawal would be detrimental was a matter of conjecture only. * * * *The agreement to withdraw was undoubtedly injurious in its tendency, and the policy contravened by it is only to be satisfied by declaring its invalidity.*

"It appearing that the plaintiff has no cause of action, the case is remanded to the court below, with instructions to dismiss the suit."

In *Lucas* v. *Allen*, 80 Ky. 681, Lucas was clerk of the Board of Aldermen of Louisville. He professed to have information that would lead to a recovery from the city, by taxpayers, of certain taxes collected from them for an illegal purpose.

He so informed the Allens, who were attorneys, and alleges that, in consideration of information to be given by him, and of his aiding in the preparation and prosecution of the

suit for taxpayers against the city, they agreed to divide with him the fees they should receive in the suits. They brought suit and succeeded, and received $18,439.25 as their fee. Lucas filed his bill in equity for his share under the contract.

The disclosure made was the furnishing of a copy of the ordinance on which the illegal assessments were made, of which ordinance the plaintiff was custodian.

The court say:

"Principle, analogy and authority unite in declaring contracts *which have an apparent tendency* to corrupt, bias, tempt or draw away public officials from the honest discharge of their duties as void, because in contravention of public policy.

"And we are of opinion that Lucas, who was an official of the city, charged with the custody and power to copy and attest the very ordinance on the authority of which the illegal assessments against the citizens were made, was forbidden by public policy to make the contract whereby, if enforced, he would receive money for the disclosures he made and the services he rendered against the city whose employment he was in, and to which the law requires him to be loyal and true so long at least as in that employment, and *in so far as it furnished him, in the course of his duties, with the information by which he sought or may seek to profit himself.* *Steele* v. *Curle*, 4 Dana, 381; *Oscanyan* v. *Arms Co.*, 13 Otto, 262 and authorities cited."

*Brooks* v. *Martin* and *Sharp* v. *Taylor* were cited by counsel, but the court say:

"And we cannot countenance the claim that it is an accomplished fact, and that therefore the proceeds of the illegal undertaking and maintenance of the suit ought to be divided. A court of equity can never be made the instrument of dividing such acquisitions between parties standing in the attitude which this record exhibits."

In *Forbes* v. *McDonald*, 54 Cal. 98, the plaintiff was one of five trustees of a mining company, two of whom had views opposed to the other two, plaintiff being the fifth. The defendants (two of the trustees) desired plaintiff to re-

sign, and to fill his place with some friend of their own. It was agreed between the parties that, in consideration that plaintiff should resign and aid defendants in electing his successor, they would give their note for the amount of a debt due plaintiff from one Owens. All these things were done, and plaintiff sued on the note. The court say:

"It is not necessary to cite authorities to show that a contract is void if a portion only of the consideration is illegal. *It does not appear to us to be at all doubtful that if the whole or a part of a consideration be that a trustee resign his trust, the consideration is illegal.* It is *contra bonos mores.* Trustees of corporations owe duties to others besides themselves. They have been placed in a position of trust by the stockholders, and to those stockholders they must be faithful. It is a violation of that trust for them to be bought out of office. They may resign when they please, but they must not make profit or benefit to themselves in the matter of such resignation."

In *Noel* v. *Drake*, 28 Kans. 265, defendant (a national-bank director and president) agreed to sell plaintiff 114 shares of the stock of the bank at $140 per share, and, upon his purchase of the stock, to have him made cashier of the bank. Defendant having refused to perform, plaintiff brought suit, alleging various items of damage.

The court say:

"The contract between Noel and Drake for such removal and sale must be held to be contrary to public policy. *The purpose and effect of the contract were liable to influence Drake in the decision of a question affecting the private rights of others by considerations foreign to those rights.* * * * In the relation of trust and confidence which Drake occupied as a director and president of the bank, which required him to look after the best interests of the bank and its stockholders, it was improper for him to be influenced by agreements with or considerations from a stranger in the selection of cashier, or in the discharge of any of his other official duties."

In *Bowers* v. *Bowers*, 26 Pa. St. 74, the plaintiff, being entitled to letters of administration of the estate of his son, of

which he was also a creditor, agreed that he would renounce his right to letters, and permit and procure letters to be issued to defendant, in consideration that defendant would assume and pay the debt of the estate to him. This was all done.

The court say that the position of administrator is an *office*, and:

"If public policy forbids traffic in the office of postmaster, as was decided in *Filson* v. *Himes*, 5 Barr, 456, it will, for superior reasons, interdict barter in the more sacred trust of administration.

"But if administration of decedent's estate be not an *office*, it is strictly a *trust*, and as such is *not to be purchased for a price which creates in the trustee an interest adverse to the cestui que trust.*

* * * * * *

"*The question here is not upon the legality of the administration, but upon the sufficiency of the consideration for the defendant's promise, and as that in its very nature endangered the purity of the trust, the law will not sanction it.*"

In *Miller's Appeals*, 30 Pa. St. 478, there was an agreement between the executor and trustee and the heir-at-law that the former should receive part of the estate in case the trusts of the will should be set aside by the courts.

The court *held* the trusts void. Afterwards the heir-at-law cited the executor and trustee to account. The latter claimed to retain his share under the agreement. The court say, (p. 494:)

"A trustee, it is said, may bargain with his *cestui que trust* * * * especially if it (the contract) stipulate that he shall no longer act as trustee. But this principle has no application to this case, for here there was no dismissal of the trustee and no attempt to withdraw from his trust. *Nor did he bargain with his cestuis que trustent, who were the devisees in the will, but with the heir-at-law who was their antagonist.* He bargained *against* his *cestuis que trustent* instead of treating with them. If a treaty with them for his own advantage would have been regarded with jealousy, how much more the traffic in which he engaged to their prejudice, whilst he continued their professed representative."

And the agreement was *held* void.

In *Ellicott* v. *Chamberlin*, 38 N. J. Eq. 604, (in Court of Errors,) the plaintiff, a widow, agreed to pay $10,000 to defendant, who was named as one of two executors in the will of her deceased husband, if he would renounce his executorship, her motive being a well-grounded fear that, if he should qualify and act, he would abuse his trust. He accordingly renounced, as did the other executor, (though without compensation,) and plaintiff was accordingly appointed administratrix with the will annexed. In execution of her agreement she paid, in money and by the assignment of a bond and mortgage, $7,500, the residue being evidenced by her note. The defendant having sued at law on the note, the plaintiff filed her bill in equity to restrain the action at law, and to reclaim the money already paid, and for a reassignment of the bond and mortgage. The bill was dismissed, the court saying, (p. 609:)

"There is no doubt that the agreement of Mr. Chamberlin to renounce for a consideration was illegal, not because of fraud or duress, as was urged before the chancellor, but because it is against public policy. It is a general principle, universally enforced, that trustees cannot use their relations with trust property to their personal advantage. An agreement to accept money or other valuable thing as consideration for violating or abandoning a trust, is illegal. A person named in a will as executor is not obliged to accept. He may voluntarily renounce for reasons that do not involve mercenary motives; but he has no right to make merchandise of the confidence reposed in him by a testator.

"In the case of *Porter* v. *Jones*, reported in 52 Mo. 399, it was held that a promissory note, whereof the consideration was an agreement to resign as administrator, with the view of having another appointed, was void as against public policy. The court said, in that case, that the agreement amounted to trafficking with an important trust; and although an administrator was not a public officer, yet he held a private trust as sacred."

* * * * * * *

"A trust is regarded as a matter of honor and conscience, and not to be undertaken with mercenary views. *Manning* v. *Manning*, 1 John. Ch. 527."

* * * * * * *

"On the part of the respondent, it is urged that the whole sum of $10,000 was not paid to procure Mr. Chamberlin's renunciation of the executorship, but that the money was to be paid in part for services he had rendered the deceased, for advice and assistance to be given Mr. Ellicott in settling the estate as administratrix with the will annexed, and for going on her bond as one of the sureties. The evidence does not sustain this view, but shows that the money was to be paid wholly for the renunciation. But even if services performed or to be performed on the part of Mr. Chamberlin had entered into the contract, it was void. A contract is void if only a *portion* of the consideration is illegal as against public policy. It has been held that a contract based wholly or *partly* on an agreement of a trustee of a corporation to resign his trust for a consideration, is illegal. He may resign when he chooses, but he must not make any profit to himself by his resignation. *Forbes* v. *McDonald*, 54 Cal. 98.

"It was the duty of Mr. Chamberlin either to renounce voluntarily, without consideration, or to endeavor to prove the will and codicil; and, after the *caveat* was withdrawn, to assert his rights as executor and proceed with the settlement of the estate entrusted to him by the testator. Instead of doing this, proceedings to probate the will and codicil were delayed, and he entered upon the effort to sell his trust. The price demanded at first was enormous, and the price obtained at the close of the barter was exorbitant. He could not possibly have been allowed one-third of the amount he received, in commissions, if he had settled the estate. He performed no service and incurred no risk. It is not the amount of the profit that determines the illegality, for a trustee is not allowed to make any profit out of his trust. The old English rule was to deny even commissions, on the theory that a trusteeship was a matter of honor, not to be compensated by money.

* * * * * * *

"There is no doubt that Mrs. Ellicott could have successfully resisted payment of any part of the money she agreed to give Mr. Chamberlin for the renunciation of his executorship, had she interposed defense. But she chose voluntarily to pay the greater part of the money, and she cannot now re-

cover what she has paid. She was a participant in an illegal contract for the purpose (as the evidence shows) of obtaining for herself the administration of the estate.

"If a contract be illegal as against public policy, its invalidity will be a defense while it remains unexecuted. If the illegal contract be in part performed and money has been paid in pursuance of it, no action will lie to recover the money back. *Smith on Contracts*, 215.

"The law will not assist either party to an illegal contract, and, the parties being *in pari delicto*, it will leave them where it finds them. If the contract be still executory, it will not enforce it, and, if already executed, it will not restore the price paid nor the property delivered. *Setter* v. *Alvey*, 15 Kan. 157.

"Mrs. Ellicott cannot, therefore, compel the repayment of the money she gave Mr. Chamberlin on the agreement or on the note, nor can she compel the assignment to her of the Yawger bond and mortgage, as prayed for in her bill. To that extent the contract has been executed. But she can rerist the payment of the balance of the note for which suit has been brought. Her defense to the note can, however, be made in a court of law, and therefore the suit in the circuit court, already commenced, should not be enjoined."

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The doctrine of the cases cited, viz., that it is the *tendency* of agreements which is controlling upon the question of their illegality as being against public policy, is the settled doctrine of this court.

Thus in *Marshall* v. *Balt. & Ohio R. Co.*, 16 How. 314, it is said, (p. 334:)

"It is an undoubted principle of the common law that it will not lend its aid to enforce a contract to do an act that is illegal or which is inconsistent with sound morals or public policy, or which *tends* to corrupt or contaminate, by improper influences, the integrity of our social or political institutions. * * * * Hence the law avoids all contracts to pay money for procuring a marriage."

And (p. 335:)

"Bribes in the shape of high contingent compensation *must necessarily lead* to the use of improper means and the exer-

cise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them," etc.

So, in *Wheeler* v. *Sage*, 1 Wall, 518, 530—

"The court was imposed on, and a combination formed, *the object and direct tendency* of which was to secure the title to the valuable real estate of an insolvent debtor at the expense and sacrifice of his creditors."

And in *Tool Co.* v. *Norris*, 2 Wall. 45, it is said, (p. 55,) of agreements, for compensation, to procure appointments to public offices:

"Agreements, for compensation, to procure these appointments *tend* directly and necessarily to introduce such elements. The law, therefore, *from this tendency alone*, adjudges these agreements inconsistent with sound morals and public policy."

And again, (p. 56:)

"It is sufficient to observe, generally, that all agreements, for pecuniary considerations, to control the business operations of the government, or the regular administration of justice, * * are void as against public policy, *without regard to the question whether improper means are contemplated or used in their execution. The law looks to the tendency* of these transactions, and *it closes the door to temptation* by refusing them recognition in any of the courts of the country."

## IX.

It needs no argument to show that in not one of the cases cited, whether in this or other courts, was the contract condemned as illegal more clearly against public policy, more clearly evil *in its tendency*, than the agreement which plaintiff alleges here. Whether regard be had to his position as receiver and his duties to the court as a citizen and as its trusted representative, or to the opportunities and temptations which such a position offers the holder of it to enrich himself at the expense of his *cestuis que trustent*, or to the reproach and scandal to the administration of justice that would result if such contracts were permitted, there is

no feature of illegality to be found in any one of the cases cited that is not present in the contract which plaintiff says he made.

And regarding the effect of such contracts, if upheld by the courts, upon the *public* interests, the same conclusion must be reached. This court has more than once sounded its warning of the dangers that menace our civil and social system from contracts that tend to corruption in the other departments of the government, national and state. Is the purity of the courts, of their officers,—their fiduciary officers,—and of their administration, less vital to the commonwealth than the purity of the legislative and executive departments? Is the danger too remote or too insignificant to be judicially taken notice of? As to its remoteness, if plaintiff's bill of complaint is true, the danger is imminent, is actually present. And even were plaintiff's case, as he alleges it, a solitary one, are defalcations by trustees so rare in these days that their recurrence needs not to be guarded against? As to its insignificance, it has been computed and judicially declared, and in this court, that of fifty important railways in the eighth circuit, hardly six have escaped the hands of a receiver. Let this court impress the seal of its approval on such contracts as plaintiff alleges here, and what shorter, or safer, or more corrupt road to wealth than through the office of a railway receiver? The courts it is true will be incorruptible. Their judges are above pecuniary temptation. But will they be above reproach? And how long will they be above suspicion.

## X.

But this case does not rest on the mere *tendency* of the alleged contract.

Such a contract made by a receiver is in itself and in the very making of it a breach of trust, inasmuch as in making

it the receiver assumes an attitude of hostility to the interests he is bound to protect. He clothes himself with interests and obligations which are at war with his duties to the court and his *cestuis que trustent*, and which disqualify him to hold his office.

A.

And more than this. The alleged agreement clearly contemplates that plaintiff's interest was to be kept secret. All the transactions in carrying out the enterprise are to be conducted in other names than his. This, indeed, would be "essential to the success of the enterprise." He alleges in his bill, it is true, and his counsel make it the basis of an argument, that he disclosed his interest to Mr. Kennedy, the agent of the bondholders. But by far the greater part of the bonds purchased were bought in one mass from the Dutch Committee through their agent, Mr. Kennedy, in New York. The bill alleges, (p. 21,) and the agreement recited in Judge Dillon's order (p. 48) shows, that of the $15,000,000 bonds issued upon the line of which plaintiff was receiver, $11,400,000 were included in the purchase from the Dutch Committee. Plaintiff says in his bill (p. 21) "that *before the said purchase* of said bonds or any of them, *and while negotiations were pending for the purchase* of the bonds represented by said Kennedy, as aforesaid, *he, the plaintiff, informed the said Kennedy of his said interest and connection* with the said Kittson and Hill *in the project for the purchase of said bonds*," (but *not* of his interest in any project for buying the mortgaged property by means of the bonds or otherwise,) "and that the said Kennedy had full notice and knowledge that he was so connected therewith and interested therein, and fully sanctioned the same."

And he goes on to say that Mr. Kennedy, as agent for the Dutch bondholders, "*strongly recommended the bondholders to*

*sell their bonds on the terms offered* by the said Stephen, Smith, Kittson and Hill" (*not* by them *and plaintiff*) "as the best disposition of them that could be made; and that *but very few of said bonds were purchased* by said Stephen, Smith, Kittson and Hill *except under and through the said negotiations* with the said Kennedy therefor."

Now, what is the fact? What is the strongest testimony that plaintiff produces to show that while Mr. Kennedy was negotiating the sale of the bonds, and while he was recommending his principals in Holland to accept the terms offered as the best that could be obtained, he was informed that plaintiff was a concealed buyer?

The purchase had been concluded on or before *February 25, 1878*, and on that day the result had been cabled to Holland, before Mr. Kennedy had any information that the plaintiff had even been *offered* an interest, or claimed that he had been offered an interest. (See Mr. Kennedy's letter, p. 41.)

The plaintiff himself says that in his letter, *received by Mr. Kennedy after the sale*, he wrote that he had been merely "*offered*" an interest, and he gives as a reason, (p. 42,) "I was very desirous of getting Mr. Kennedy's consent, *without letting him know that I was one of the parties that carried on all the negotiations* * * * *and in all my conversations* with them, Kennedy and Barnes, *had failed to let them know* that I had the same interest that Kittson and Hill had."

Why did not plaintiff inform Mr. Kennedy *pending the negotiations?* When asked this question on cross-examination, he said (p. 44,) "for fear it might become public that I had an interest, and the attorney for the stockholders would go to the court and have a receiver appointed and have me removed."

But how was it less likely to "become public," if he informed Mr. Kennedy *after* the sale of the bonds than if he did so before the sale? And why would not his removal be

as certain and as disastrous after the bond purchase as before?

He says (p. 44) that he "got news almost every day," during the negotiations, "how the thing was progressing," and he times his announcement of the *offer* of an interest so that it shall reach Mr. Kennedy *just after the sale.*

B.

If it were material and open to inquiry at this stage of the case whether plaintiff *ever had* any interest at all, then if his own contemporaneous written statement is to be believed, *he had no interest at all, nor had he ever been "offered" any such interest as he here claims.* At the outside his letter shows that *he thought* he had been offered *some* interest; and we may observe in passing that it was one of those cases where the wish was father to the thought, which had no other parentage.

C.

But taking plaintiff's testimony and his falsification of his letter therein, and assuming the testimony to be true where not self-contradictory or intrinsically incredible, and it appears that he purposely deceived the agent of the bondholders as to his interest in the negotiations for the purchase until the sale had been concluded, and that the reason he now brings forward for that concealment, if a good reason for concealment before the sale, must have been just as controlling a reason for concealment afterwards.

But when Mr. Kennedy's relation to the bondholders and the property, and plaintiff's relation to the property and to Mr. Kennedy, are considered, the reasons for plaintiff's concealment of his interest—or rather his hope of an interest—are obvious.

As general manager he was the representative of the trustees in the performance of the duty they had assumod of op-

erating the Main and Branch Lines of the First Division Co. As a trustee in possession and also as special agent of the bondholders of that company, who resided in Holland, it was Mr. Kennedy's duty to keep himself informed of the condition, business and earnings of the road, and for that information he must, of course, (living as he did in New York, and even had he lived in St. Paul,) rely on his general manager. And as agent for the holders of four-fifths of the mortgage bonds on the Extension Line of the St. Paul Co., it was his duty to inform himself in the same manner as to that line, and for such information he must look to plaintiff, who held and operated it as receiver.

And while he was negotiating a sale of many millions of the bonds of his principals, it was especially his duty to inform himself on these points, on which depended the value of the bonds he was selling. On information received from plaintiff, *and accepted as disinterested and honest*, he acted and must have acted in agreeing to the terms of sale, and advising their acceptance as the best that could be secured. During all this time, from their positions toward each other, he must have been in constant communication with plaintiff. *Did not plaintiff* (if in fact secretly interested in the negotiations) *owe him the duty of informing him of that interest and the full extent of it? Had not Mr. Kennedy the right to know that he was not receiving disinterested advice? to know that it was the buyer who was advising the seller?*

And can there be any doubt that, if he had known that plaintiff was really interested in the enterprise of Messrs. Kittson and Hill, he would have resorted to other and trustworthy sources of information, even if he had not refused to sell at all to any such combination?

And while plaintiff, if he had any interest in the scheme, had good reason to fear that its discovery would lead to his removal as receiver, he had equally good reason to fear that his removal as general manager would not have been left to

the action of the stockholders, but would have been speedily effected by Mr. Kennedy.

This is the reason why, if he had any interest or hope of an interest, he never mentioned the matter to Mr. Kennedy till the bonds were sold. And can the inference be avoided that if plaintiff had the interest he claims, or any interest or any hope of an interest during these negotiations, he did not content himself with concealment pending the negotiations and falsehood afterwards (he confesses both under oath) in respect to that interest, but added to this fraudulent concealment fraudulent misrepresentations as to the property he wished secretly to buy?

His counsel complain that the record raises only the question of constructive fraud, and that in argument we make baseless assertions of actual fraud. But the proof of those assertions is his own testimony in the record.

D.

And his own testimony fails to show that he *ever* informed Mr. Kennedy that he had more than an offer—a hope—of an interest—still less does it show that he ever disclosed the *magnitude of the interest* and *the price he was to pay for it*.

On his direct examination he says (p. 42) that early in May, 1878, he "had a conversation with Mr. Kennedy in New York about my being interested with Kittson and Hill in the purchase of the bonds referred to. Mr. Kennedy made no objections, but rather seemed to be gratified. He thought it was a good thing for me, *and only advised me to ascertain how much money it would be necessary for me to raise to carry out the projeet.*"

On cross-examination, being asked if, in that conversation, he told Mr. Kennedy that he had been interested in the beginning, he says, (p. 44:) "My impression is that from my conversation with him he would infer that I had been interested from the beginning."

"Q. Did you tell him so in so many words?
"A. I do not recollect of having done so positively."

E.

The passage italicised shows that Mr. Kennedy not only never supposed that the plaintiff had any interest, but never seriously considered the probability of his getting any—never thought it probable enough to be considered, and certainly never dreamed that plaintiff was to have a *secret* interest to be paid for, not in money, but by secret services. His words are an intimation that the enterprise is too large for plaintiff's means. And here it may be permitted to be observed that it is in some sense a misfortune for respondents in this appeal that they are respondents. On the terms on which the cause was heard by Judge Treat, at a time when, as defendants insisted, they had the right to take Mr. Kennedy's deposition which they had given seasonable notice of taking, and the taking of which had been prevented partly by accident and partly by misunderstanding, the defendants were secured the right to take his deposition should the court deem that any evidence on their side was needed; it being thought likely that the cause could be determined on mere questions of law, and on the evidence as it stood.

This reference to matters not in the record would be perhaps less permissible, if the question whether plaintiff in fact informed Mr. Kennedy of his interest were at all material. In our view of the case, the question whether this suit will lie depends on whether this alleged contract was a lawful contract when it was made, and not at all on any subsequent acts of plaintiff, whether innocent or fraudulent in themselves; and hence we consider the only issue of fact raised by those averments of the plea not stipulated to be true—viz., the issue whether plaintiff gave truthful information to Mr. Kennedy and the bondholders—a wholly immaterial issue. At the same

time, should the court deem the alleged agreement not void by reason of any inherent viciousness or vicious tendency, nor unless concealment from the bondholders was part of its purpose, proof of concealment practiced has a tendency to prove concealment intended when it is alleged to have been made.

And since Mr. Knnnedy's name is brought into a suit in which he is not a party, it is due to him, in view of some expressions in the evidently very hurried letter of February 28th, to bear in mind that the omission to take his testimony was not due to any unwillingness on the part of himself or of the defendants, nor to any inability of Mr. Kennedy to justify everything he wrote, said or did—even his retention of plaintiff as general manager, which last certainly would need justification if he had supposed that plaintiff had received a serious offer of an interest or had any expectation of getting one.

G.

Returning from this digression we submit that

1. Plaintiff's own testimony establishes the only averment of the plea which is not stipulated to be true, to wit, his failure to inform Mr. Kennedy that he was interested in the purchase of the bonds. On his own statement he never got any further than to tell Mr. Kennedy (truly or falsely) that he had been "offered" an interest.

2. And plaintiff's own testimony shows that he never informed Mr. Kennedy that this "offer" had been made before the negotiations had been closed; never informed him that it was an offer of the great interest he now claims, an interest equal to that of each of the defendants; never informed Mr. Kennedy that he was to have that interest on different terms from that on which they were to get their interest; never informed him that he was "*to furnish no money*," (a term in the alleged agreement which is a necessary inference from his statement in the bill, and which he expressly alleges in

his complaint in the state court, as appears in *Farley* v. *Kittson*, 27 Minn. 102,) but that he was to pay for his interest by secret services, by "facts, information and advice," by selling the peculiar information and influence which his dual position furnished him, and which he bartered for a price; and never informed Mr. Kennedy that the interest offered, whatever its extent and however to be paid for, was to be a *secret* interest.

3. Even had he told Mr. Kennedy the truth and all of it, the fact still remains that there were other bondholders, not represented by Mr. Kennedy, and also the stockholders in the two companies, from whom he concealed whatever interest he may have thought himself entitled to, whether in possession or expectancy. And he swears that this concealment from the stockholders, at least, was intentional, and to prevent their effecting his removal from office. If his right to maintain this suit depends on his disclosure of this alleged agreement to any one, it was just as necessary that he should disclose it to the stockholders, to the holders of the $3,600,000 bonds of the $15,000,000 issue,—who were never represented by Mr. Kennedy either as trustee or agent,—as to Mr. Kennedy himself.

On his own showing he never made any such disclosure. He states generally in his bill, (p. 22,) (and, in his deposition, says (p. 43,) "It is," to a question reciting that statement and asking if it be true,) that he always answered truthfully all inquiries by bondholders and others. (As to just such a general averment and testimony, by an assignee in bankruptcy, see *Pooley* v. *Quilter*, 2 De G. & J., 327, 351.) But he does not even allege in his bill, still less does he attempt to show, that he ever informed any of these persons of the one thing they were most interested in knowing,—viz. that he had an interest in the purchase of the bonds and property, an interest to be paid for by those secret and peculiar services which his position as receiver and general manager alone en-

abled him to render, and which were "indispensable to the sucess of said enterprise."

H.

*By the plaintiff's own testimony, therefore, it is clearly proved that the only averment of the plea put in issue by the replication, and not expressly stipulated to be true,—whether material or immaterial,—is true in fact.*

I.

But the leading counsel for the plaintiff agrees with us that this averment is *immaterial*, and the issue made upon it —*the only issue of fact in the case*—is an *immaterial* issue.

The only controversy between us is as to the grounds on which it is immaterial.

Our position is that the alleged agreement was legal or illegal when made, and without regard to what was done or omitted under it; that it was illegal because of its *tendency*, whether such tendency was realized or not.

And if the court should think that, to make the agreement illegal, there must have been an express purpose to conceal it, then we say that the legality of the agreement depends on the existence of that purpose when it was made, and not at all on whether that purpose was subsequently carried out or departed from.

In any view of the case, from our standpoint, the question whether concealment was practiced is not in itself a material question. The fact of concealment or disclosure can only be material as evidence to show, in case of doubt, what the purpose of the parties was when they made the alleged agreement; and this on the familiar rule that where the terms or the purpose of any agreement are in doubt, the

conduct of the parties under it is competent and often the best evidence of their intention when making it.

The plaintiff's counsel however assumes that the validity of the agreement depends on the acts done under it; that if plaintiff committed frauds in carrying it out he cannot recover, but if he did not commit them, he can. And he concedes that if plaintiff made false representations to the bondholders as to the property, this would bar a recovery. Whether he thinks that false representations in regard to plaintiff's interest would also be a bar, is left to conjecture.

His position is that plaintiff, as receiver and general manager, had a right to buy the bonds—therefore, he had a right to conceal his interest, to be a secret buyer. That he had a right to buy the mortgaged property,—therefore he had a right to be a secret buyer.

But he does not and cannot deny that plaintiff's interest in the purchase of the bonds or property, *even openly*, would make the purchase voidable—that he could be compelled to relinquish the purchase. And he answers this by saying that the purchases could be avoided, and the surrender compelled, only by the bondholders. And in the principal brief for the plaintiff it is elaborately demonstrated that such a purchase would be thus voidable. But what sort of a right to purchase is that where the buyer can be compelled to surrender to the seller what he bought? And *why* can plaintiff be compelled by the bondholders to surrender? Because his purchase is a violation of his duty to them, and a fraud—actual or constructive according to the means used by him—upon them. And if his purchase is a breach of duty and an actual or constructive fraud, an agreement with others whereby he contracts for an interest—open or secret—in such a purchase to be made, is an agreement to commit a fraud upon them. And if a secret purchase by a trustee *per interpositam personam* is *actually* fraudulent, (*Michoud* v. *Girod*, 4 How. 503, 553,) then plaintiff's alleged agreement,

if he stands on the footing of a trustee, was an agreement to commit an *actual* fraud on his *cestuis que trustent*—and who shall say that such an agreement is lawful?

The cases already cited show that many things which are lawful if done openly are unlawful if done secretly. Whether concealment in any case and of itself renders a transaction fraudulent, depends solely on whether, in that case, the party practising it was under a duty to disclose.

But the position that a railway receiver is under no disability to buy *openly* the mortgage bonds as a means of acquiring the mortgaged property, or to buy the property by means of the bonds purchased, we have already shown to be untenable.

Plaintiff's counsel conceds that a trustee charged with *the sale* of property would be disabled from buying, and a secret purchase at his own sale would be fraudulent in fact. But he argues that this cannot apply to a purchase of bonds, or a purchase of the mortgaged property, because the receiver is not charged with the sale of the bonds or of the property.

This distinction is, we think, unfounded, and unknown to the law. The contrary seems to us so well settled that in an original brief we should not feel justified in discussing the question at large. But this cause has been once argued. The distinction taken is the key of the position of plaintiff's counsel, and was argued by him before the court. A reargument has been directed of (as we must assume) the whole cause. And this circumstance, and the fact that this position is taken by counsel so deservedly eminent for learning, ability and candor, would make it presumptuous for us to pass by, as unworthy of refutation, an argument on which he lays so great a stress. For this reason we have already discussed with, we fear, unpardonable minuteness, the reasons, growing out of his position, which disable a receiver or such a general manager as plaintiff from engaging, openly or secretly, in such a traffic. And without repeating that discussion, we

here subjoin extracts from two cases in the Irish Chancery, in one of which a receiver's purchase of the property, and in the other his purchase of a charge upon the property, were set aside. In neither case was the receiver entrusted with the sale of the property or of the charge upon it.

In *Eyre* v. *McDonnell*, 15 Ir. Ch. 534, an annuity charged on lands being in arrears, the annuitant brought suit to have the annuity declared well charged upon the lands, and for a receiver of the lands charged. In this suit the defendant was receiver, and, while receiver, he bought the annuity. The annuitant's personal representative filed his bill to set aside this purchase. The chancellor says, (p. 548:)

"What, then, is the character of this transaction, and can such a proceeding be sustained? It is a sale to the receiver of the very thing over which he was appointed,—the annuity which it was his duty to collect. *Prima facie*, the doctrines of this court are in direct opposition to such a transaction, and the position of a receiver has been compared in *Alven* v. *Bond*, (Flan. & Kelly, 196,) and in other cases, to that of other parties who have been declared incapable of purchasing the property held by them in a fiduciary capacity. In the judgment in that case the Master of the Rolls, Sir Michael O'Loghlen, expresses himself thus:—'I do not at all agree with the counsel for the purchaser, who contend that if the court shall set aside this sale because the purchase was made in trust for the receiver, it will introduce a new doctrine into a court of equity, and make an order which no other judge ever before ventured to make; when I find it to be the general rule of this court, founded on principles of public policy, that trustees, assignees of bankrupts, solicitors or agents for the assignees, and all persons filling any confidential office in relation to the property to be sold, shall not, without the special leave of the court, and probably the assent of the parties interested, purchase the property with which their office is connected,—I make no new decision if I apply that principle to a receiver, and hold that a purchase by him, at a sale under the decree of this court, of the property over which he is acting as a receiver, made without the sanction of the court, or the assent of the parties interested, but concealed from both, cannot be sustained.' It has been argued, however, on behalf of the respondent in the present

case, that the principles laid down in *Alven* v. *Bond*, are inapplicable, on the grounds that this proceeding of Mr. M'Donnell was not in any way 'concealed.' But it is plain that, though made known to some at least of the parties interested, *it was concealed from the knowledge of the court.*"

And after stating the rule which avoids purchases by executors or by assignees of a bankrupt of legacies, or of claims against the estate, as expounded in *Barton* v. *Hassard*, 3 Dr. & War. 461, and *Pooley* v. *Quilter*, 2 De G. & J. 327, the court proceeds, (p. 551:)

"Such is the law as to purchases made by the assignee in bankruptcy. Here we have a receiver appointed by this court for the purpose of collecting an annuity, with great powers of becoming acquainted with the position of the estate, and its incumbrances, and with great powers of misrepresenting, to the party who is dependent on his exertions, the state, value and prospects of the property, while at the same time he is enabled to postpone and delay the payments. The powers of a receiver, it has been remarked, are greater than those of almost any other person in a fiduciary capacity."

This last observation is especially true of a railway receiver, who "generally takes the property out of the hands of the owner, and operates the road in his own way with an occasional suggestion from the court, which he recognizes as a sort of partner in the business," (*Barton* v. *Barbour*, 104 U. S. 138,) but,—unless the court accepts the views of plaintiff's counsel,—not a partner in that branch of the "business" which is involved in this litigation. See also *Davis* v. *Gray*, 16 Wall. 203, 217–8.

In *Alven* v. *Bond*, Flan. & Kelly, 196, cited in the above case of *Eyre* v. *McDonnell*, land in charge of a receiver to collect rents and profits pending a foreclosure suit were sold by the master, under the final decree, to one Murdock, and the sale was confirmed without opposition. The purchase by Murdock was, in part, in trust for the receiver and his father. The defendant in the cause moved to set aside the

sale. In opposition to the motion the receiver made oath "that he had not the most remote intention of joining in the purchase until the day previous to the sale, when his father first proposed to him to do so, to which he agreed, and that he only heard of his father's intention to become the purchaser about a month previous to the sale." In this he was sustained by the affidavit of Murdock and of his father, the latter of whom also denied all collusion, stated that he had never interfered with his son in the receivership, had taken no part in the preparation of the statement of the rental of the estate prepared for the information of bidders at the sale, nor was he aware that it had been prepared by him. Murdock swore, also, that the rental at the sale stated the number of acres and the amount of the rents higher than it was in a rental prepared by defendant himself for the purpose of negotiating a loan. In both these rentals a bog and a supposed lead mine were omitted.

The solicitor for the mortgagee, (plaintiff,) in opposing the motion, made affidavit to the same effect concerning the rental, and, also, that after it was prepared and posted, he heard that mineral had been found, (but not, till after the sale and confirmation, that a mine had been opened,) and that at the sale he mentioned in the hearing of bidders that there was some lead or other mineral ore upon the premises. Also that defendant's solicitor and counsel attended in the master's office at the sale, and never till the present motion objected to the rental as inaccurate.

After the passage already appearing in our quotation from *Eyre* v. *McDonnell*, the master of the rolls reviews various cases of purchases, by assignees in bankruptcy, or by the solicitor to the commission, (*Ex parte James*, 8 Ves. 337, 346; and as to which see *Ex parte Lacey*, 6 Ves. 625, 628,) and says, (p. 213:)

"The case of *Ex parte Hughes*, (6 Ves. 617, 624,) applies the principle on which the court acts to the case of a creditor

of a bankrupt, consulted as to the best mode of conducting a sale of the bankrupt's property, and afterwards purchasing the property at such sale. Lord *Eldon* in that case says: 'If Hughes could bid, or the solicitor tendering the estate for sale, or *agent for the sale, however constituted*, and if the danger of *that* species of transaction is compared with the danger of a purchase by a trustee, the court would overlook a danger far more considerable than that at which it looks with so much anxiety.'

"The principle to which I before adverted, having been applied to the cases to which I have referred, it remains to be considered whether the court ought, after the confirmation of a sale under a decree, to set aside such sale, and direct a resale, at the instance of the owners of the estate, on the ground that the purchase was made by or in trust for the receiver in the cause, the leave of the court to bid at such sale not having been obtained by him.

"I am of opinion that the court ought to do so. I think that it would be very dangerous to allow a person who has so much control over the property as a receiver of the court must necessarily have, such opportunities of acquiring a knowledge of the circumstances and value of it, which may not be easily attained by others, who may be, as in the present case, employed in the preparation of the rental to be used at the sale, (which every one knows to be one of the most important documents used on such an occasion,) to become the purchaser of the estate without the sanction or knowledge of the court. By the terms of Lord Redesdale's order of the 6th of August, 1804, the receiver is bound to use proper diligence to inform himself of *the nature and circumstances of the property which he shall be intrusted with*, &c., whether let at fair rents, &c. Under Sir Anthony Hart's order of the 15th of July, 1828, he is, on every letting under the court, to give information to the master as to the tenants, and whether the rents paid are fair occupation rents, and, if not, what would be fair rents to be paid; and again, under the 185th order of November, 1834, he is to *manage* and let the lands over which he may be appointed, with the approbation of the master. Very great powers are given to, and much confidence placed in this officer, who is placed in a situation which would enable him, if inclined to act dishonestly, by reducing the rental or lettings under the court, or otherwise, to bring to a sale under very disadvantageous terms the property confided to his care, and thus become the purchaser at an undervalue. I might put many instances

in which a receiver might avail himself of the power given to, and the trust reposed in him, to procure a purchase at an undervalue of the estate confided to his management; and I have no doubt that principles of public policy require that he should not be permitted to bid at a sale under a decree, except under some special order obtained with notice to the parties interested, and probably with their consent."

J.

And even if no concealment were actually practised on *the bondholders*, the fact is asserted by plaintiff himself that concealment was practised on the court. No proof of this fact was needed. *Res ipsa loquitur.* The character of the judges of the circuit court, of the very eminent jurist who then adorned the bench of the eighth circuit, is in itself proof demonstrative that he did not continue the plaintiff in office, did not make the order of May 31, 1878, for completing the line, (Record, p. 47,) did not expressly charge plaintiff with the duty of exacting from Messrs. Smith, Stephen, Kittson and Hill strict compliance with the terms of that order, did not confirm the decretal sale, with any knowledge or suspicion that his receiver was a secret partner with the men he was set to watch, was secretly interested in the purchase of the bonds and of the property. And so long as Judge Dillon was on the bench, this claim of plaintiff was never asserted in the circuit court. At the last term held by Judge Dillon in Minnesota, this sale was confirmed. His resignation had been tendered, to take effect a few weeks afterwards, and the order of confirmation was one of the last acts of his judicial life. It was with good reason that plaintiff brought his first suit in the state court, alleging himself, too, to be a citizen of Minnesota. And when that suit had gone against him and had been dismissed, and the judge whose confidence he had betrayed had retired from the bench, he first appears with this claim in the circuit court, alleging himself to be—

what he has always been—"of Dubuque, Iowa, and a citizen of the state of Iowa."

And it needs no argument to show, (even were the uninterrupted concealment not plenary proof of the original purpose to conceal,) that if the agreement alleged in the bill was ever made, it was and must have been understood by the plaintiff and all the parties that success in concealing it from the court was the hinge on which the entire enterprise must turn, and this concealment must have been a cardinal point in their purposes and their agreement.

And that the concealment thus purposed was actually practiced and was wilful, the plaintiff himself testifies.

If actual fraud in carrying out a contract has any bearing on the question of its illegality, this alleged contract is even more illegal in this respect than any in the reports of this court.

The fraud which, if plaintiff is to believed, was practiced on the court, was not merely constructive. Where disclosure is a duty, suppression of truth is the assertion of falsehood. From the day this alleged agreement was made, and if it was made, plaintiff's retention of office was a daily representation that he had not acquired secret interests that disqualified him from holding the confidence of the court or performing his fiduciary duties. When he stood by and heard Judge Dillon read the order of May 31, 1878, before he signed it, with its recital "that George Stephen, Donald A. Smith, Norman W. Kittson and James J. Hill represent and show to the court that *they* are the equitable owners of $11,400,000 of the $15,000,000 issue of bonds," he joined in that representation, which he says he knew was false. When he received the judge's charge: "Now, Mr. Farley, I want you to remember that you are my man in this matter; you represent the court," and the injunction to see to it that the gentlemen named fully lived up to and performed the conditions of that order, was not his concealment of his interest as direct, positive

and unqualified a deceit and fraud upon the court as any representation that language is capable of expressing? What element of actual fraud was wanting?

Were the frauds upon the court in *Randall* v. *Howard* and *Wheeler* v. *Sage* such as to bar the approaches to a court of equity against the men who had committed them, and yet this plaintiff be a welcome suitor? The guilty parties in those cases owed to the administration of justice only the duties common to every citizen. This plaintiff owed all those duties and in a higher degree. And he owed others. He was the trusted officer, the representative of the court, owing to it a limitless good faith. He was a member of the household of justice, and his infidelity to his head was as petit treason.

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*In any possible view of the case, therefore, the alleged agreement on which the plaintiff relies was an agreement upon an illegal consideration, and was in its inception illegal and utterly void. And the means which plaintiff says were in fact used in carrying it out and acquiring the property of which he now claims a share under that contract, were infected with fraud both constructive and actual.*

## THIRD.

Escaping from the maze of what has seemed to us immaterial controversies of fact and law into which we have been unwillingly drawn, we proceed to discuss the third question stated by us—and this a question of pure law, viz.:

*If the alleged contract was illegal and void in its inception, and a mere nullity, can the plaintiff nevertheless maintain this bill for an accounting and divison of the profits resulting from the execution of the provisions of that void and illegal contract, between the alleged parties to it?*

### I.

It would seem that to state such a question is to answer it. Plaintiff can have no claim to any share of those profits except through the contract alleged in his bill. His first step in his suit is to show a contract. If he fails to show that any contract was ever made, he fails to show any right whatever. But if the contract he alleges is an illegal contract, it is, *ex vi termini*, no contract whatever. To show an illegal contract is to show no contract at all.

That a contract which is illegal because against public policy is, as between the parties to it, utterly void, is the doctrine of all the cases we have cited.

"*It has long been settled* that a promise made in consideration of an act which is forbidden by law is void.

"*It has never been doubted* that a note given on a consideration which is prohibited by law is void.

> *Craig* v. *Missouri*, 4 Pet. 410, 436–7, *per* Marshall, C. J.

"If either of the portions of the consideration for which the notes were given was illegal, the notes are void *in toto*.

Such is the elementary rule, for which it is unecessary to cite authorities."

*Hanauer* v. *Doane*, 12 Wall. 342, 345, *per* Bradley, J.

There can be no question of voidability or of affirmance or ratification. "A transaction originally unlawful cannot be made any better by being ratified." *U. S.* v. *Grossmayer*, 9 Wall. 72, 75. As between the parties to it, a contract which is illegal as against public policy is as absolutely void as if so declared by express statute. There can be no middle ground. This contract, as between these parties, is, and always has been, either a valid contract or a nullity.

Misleading expressions are sometimes used in cases on such contracts—as that "equity will not lend its aid to enforce a contract which is illegal," as if there existed somewhere in equity a discretion to entertain suits to enforce illegal contracts. Nothing can be further from the truth. A court of equity has no more power to enforce an illegal contract than a court of law has power to refuse to entertain an action on a valid promissory note.

If this were a suit on an express promise to pay plaintiff a sum of money, great or small, in consideration that he would secretly use his information, his powers and his influence as receiver to enable the promisors to acquire the mortgage bonds and the mortgaged property in his charge, the money to be paid when the property should have been acquired, there can be no doubt that this court, or any other court into which such an action should be brought, holding (as it must) the contract to be illegal as against public policy, would not hesitate an instant in its decision that the action would not lie.

The only difference between such a case and this is that here the contract alleged is not for a stipulated sum of money, but for an interest in the enterprise and in the profits. The consideration and the object of the two contracts are the

same and are alike illegal. Is a promise to pay money on an illegal consideration a void promise, but a promise, on the same illegal consideration, to share an unlawful enterprise and its profits with the promisee a valid promise? Will an illegal consideration that cannot support a promise to pay money give rise to such a contract as equity will specifically enforce? Or will equity enforce a trust in contravention of law? or entertain a bill for division of profits, or contribution in respect of losses, of an illegal partnership—even though the partnership business be closed?

That it will not specifically enforce an illegal contract was held by this court in *Randall* v. *Howard*, 2 Black, 585, and cannot be doubted.

That it will not enforce an illegal trust was held in *Ottley* v. *Browne*, 1 Ball & B. 360, and is beyond dispute.

That it will not enforce an illegal agreement for partnership between the parties to it by enforcing contribution for losses, was held by this court in *Bartle* v. *Coleman*, 4 Pet. 184.

And that it will not enforce an illegal agreement of partnership between parties to it by enforcing division of profits, was held by this court in *Bartle* v. *Coleman*, and in *Wheeler* v. *Sage*, 1 Wall. 518.

And that a court of equity regards an agreement for an illegal partnership—for a partnership to carry on an illegal business—inoperative to create a partnership, or to clothe the parties to it with any of the rights of partners, is also held, and is the one ground of the decree, in

*Knowles* v. *Haughton*, 11 Ves. 168, (1805,) by Sir Wm. Grant.

*Armstrong* v. *Armstrong*, 3 Mylne & Keen, 45, (1834,) by Sir John Leach and Lord Brougham. (And see *Armstrong* v. *Lewis*, 2 Cr. & Mees. 274, by Lord Denman, giving the opinion of the judges in the Exchequer chamber.)

*Ewing* v. *Osbaldiston*, 2 Mylne & Cr. 53, (1836,) by Lord Cottenham.

*Gordon* v. *Howden*, 12 Cl. & Fin. 237, (1845,) by Lords Lyndhurst, (Chancellor,) Brougham and Campbell.

*Fraser* v. *Hill*, 1 Macqueen, 392, (1853,) the opinion being given by Lord Chancellor Cranworth.

*Snell* v. *Dwight*, 120 Mass. 9.

*Dunham* v. *Presby*, Id. 285.

*Atchison* v. *Malton*, 43 N. Y. 148.

*Woodworth* v. *Bennett*, Id. 273.

*Root* v. *Stevenson*, 24 Ind. 115.

*Craft* v. *McConoughy*, 79 Ill. 346.

*Lucas* v. *Allen*, 80 Ky. 681.

*Watson* v. *Fletcher*, 7 Gratt. 1.

*King* v. *Winants*, 71 N. C. 469. And in many other cases.

## II.

But it is argued that because the purpose for which the agreement was made—the buying of the bonds and the property—has been carried out; because the illegal consideration—the plaintiff's promise to secretly use his position as receiver and general manager to carry out that purpose—has been executed, this suit may be maintained.

The proposition, as stated in the brief for plaintiff, (p. 67,) is as follows:

"*Even though the original agreement were invalid as contrary to public policy, still, having been completely carried out and executed, defendants will not be permitted to defraud the complainant of the profits in their hands by raising this objection.*"

Or, to state the same proposition in other terms:

Where an agreement is illegal because its consideration is an undertaking to do unlawful acts, the party agreeing to perform those acts may, upon full performance of them, *and*

*because* of such performance, recover the price agreed to be paid therefor.

As this rule, with the substitution of "lawful" for "illegal" and "unlawful," would be the same rule which applies to lawful contracts, it follows that upon full performance of the illegal consideration of an executory contract, the party performing stands on the same footing in respect of a recovery on the promise of the other party as if the consideration had been legal. In short, an executory contract which is illegal, because founded on a promise to do unlawful acts, is legalized by the performance of the unlawful acts. An agreement which is illegal because its purpose or its tendency is the commission of unlawful acts, becomes legal upon and because of the commission of the unlawful acts to which it tended.

An agreement which provides for or tends to the commission of unlawful acts is against public policy, illegal, and void.

*Therefore*, a party to the agreement, who has performed such unlawful acts, may recover from the other party the amount named in the agreement as the price of such performance.

That this is a fair statement of the proposition of plaintiff's counsel, if applied to a promise to pay money in consideration of the performance of an act forbidden by law, cannot be questioned. Nor can it be questioned that, as thus stated, or however stated, the proposition, as applied to *such* contracts, is not law. And we doubt if any counsel has ever asked any court to hold it to be law.

But the only difference between the proposition as stated by plaintiff's counsel and as stated by us is that, in the one, the contract provides that, on performance by plaintiff of unlawful acts, and because of such performance, the defendant shall pay him a sum of money; while, in the other, the contract provides that, upon performance by plaintiff of un-

lawful acts, and by reason of such performance, he shall be entitled to a share in the property obtained by defendant by means of such unlawful acts.

Ordinarily, this difference between two promises, on the same illegal consideration, would hardly be ground on which to hold one of them legal if the other was illegal. An agreement void at common law for maintenance was never deemed to be made valid by reason of its being also champertous.

But the plaintiff's counsel insist that their proposition, and hence the distinction between this case and *Marshall* v. *Balt. & Ohio R. Co.*, *Trist* v. *Child*, *Norris* v. *Tool Co.*, *Oscanyan* v. *Arms Co.*, *Harrington* v. *Victoria Graving Dock Co.*, *Fuller* v. *Dame*, (to say nothing of the other *cases at law* we have cited and hundreds we might cite,) is sustained by three decisions which they cite. Even then they show no distinction between this case and *Bartle* v. *Coleman*, *Randall* v. *Howard*, *Wheeler* v. *Sage*, and the many cases on illegal contracts we have cited, and little, if any, between this case and *Meguire* v. *Corwine*, 101 U. S. 108.

The cases on which the plaintiff relies are

*Sharp* v. *Taylor*, 2 Phil. 801, (1849.)
*Brooks* v. *Martin*, 2 Wall. 70.
*Planters' Bank* v. *Union Bank*, 16 Wall. 483.

The second of these cases rests upon the first, the third upon the second, and the last two profess also to be based on certain English cases, which, however, do not support them if they are to be construed as maintaining the rule for which plaintiff here contends.

We have little doubt of our ability to satisfy the court that these cases do not maintain any such rule, and that certain expressions of the court, especially in *Sharp* v. *Taylor* and *Brooks* v. *Martin*, have been misunderstood by plaintiff's counsel, as they have been misunderstood by some courts and misapplied by others.

And if the cases do assert the rule for which plaintiff's counsel contend, in its application to a case like this, we have no hesitation in saying that they are at war with elementary principles, and the overwhelming array of the authorities; that they find no support whatever in any antecedent case; that they assert a doctrine clearly erroneous, and which cannot be sustained by the reasoning of the cases themselves or by any valid process of reasoning; that they are mischievous in their tendency, are in every way anomalous, and ought to be forthwith overruled.

## III.

Before considering what those cases really decide, and what the reasoning and *dicta* in them really mean, it may be well to state and illustrate a few elementary rules as to which there can be no dispute, and which, in their application to the cases in question, will, as we think, fully bear us out in our attitude towards those cases.

### A.

And *first*.

Since the question whether a contract contravenes public policy, and is illegal and void, is to be determined by its *tendency*, without regard to the acts done in execution of it, and also because any contract is either legal or illegal when made, it follows that

*A contract which is illegal in its inception cannot be made legal by any subsequent conduct of the parties to it.*

"The agreement, being illegal and absolutely void at the time it was made, can derive no force or validity from events which happen afterwards." *Kennett* v. *Chambers*, 14 How. 38, 51, per Taney, C. J.

The case cited strikingly illustrates this rule, as do also
*Evans* v. *Richardson*, 4 Mer. 469.
*Scholefield* v. *Eichelberger*, 7 Pet. 586, 594–5.
*Coppell* v. *Hall*, 7 Wall. 542.

In each of these cases an action on a contract, illegal when made, was defeated for that reason, though, when suit was brought, (and, in *Coppell* v. *Hall*, when performance was demanded and refused,) such a contract might lawfully have been made.

Of course, this rule does not prevent the parties to an illegal contract from discarding it and making a new contract embodying so much of the consideration and purposes of the original contract as were free from illegality—if any such there were.

B.

And *secondly*, and for the same reason,

*A contract legal in its inception will not be made illegal by anything done in carrying it out, or by any subsequent illegal agreement between the parties.*

(Of course, if the subsequent illegal agreement is in effect a modification of the former legal one, so that thenceforth the two are united in one inseparable contract, that contract, having its inception at the date of the second agreement, will thenceforth be the only contract between the parties, and will be illegal.)

This *second* rule is illustrated in a series of English cases on pawnbroker partnerships, which will be fully stated under another rule.*

In some of the reported cases these two rules (and especially the first) might on a casual reading seem to have been departed from. In a suit on any contract (legal or illegal) the plaintiff must prove (if put in issue) the making of the contract and the performance of the consideration.

* And by Wetherell v. Jones, 3 B. & Ald. 221.

Parties to illegal agreements rarely put them or, at least, the terms which make them illegal, into writing. And hence in most cases proof has to be made of the acts of the parties under the agreement, not merely to show performance, but to prove the agreement itself. (See the English pawnbroker cases, *infra*.) And in nearly if not quite all the cases, the wisdom and the reason of the rule which pronounces agreements having an evil tendency to be illegal is more than justified by the proof which shows how fully the tendency was realized in the particular case. And hence, as is natural, the indignation of the court is aroused and its moral sense shocked by the things done, and at them and at the agreement as *resulting in them*, and not as merely *tending to them*, it aims its denunciations.

C.

*Third.*

The circumstance that money or property is the subject-matter of an illegal agreement, or has been paid as the consideration of an illegal agreement, or is the fruit of unlawful transactions in execution of an illegal agreement, does not preclude such money or property from becoming the subject-matter of subsequent valid contracts between the parties (or either of them) and third persons, or between the parties to the illegal agreement themselves.

1.

This rule, also, seems to have been sometimes overlooked by the courts, if we may reason from unguarded language in their opinions. Just as at common law a cartwheel that occasioned a man's death was offered as a deodand, and just as the Nibelungen hoard was fabled to bring woe to its possessor, so the courts sometimes speak as if the illegality of

an agreement—of the consideration and the promise—inhered in the "accursed gold" paid in consideration, or the ill-gotten gain, proverbially unprosperous, that was realized as the fruits of unlawful transactions under it,—as if the "fruits of iniquity" were in themselves iniquitous. And other expressions would indicate that parties to an illegal agreement—especially if they carry it out in unlawful acts, suffer a "*capitis diminutio*," incur a disability to contract with each other at all, or to contract with third persons as to the money or property so realized, and especially to make contracts with each other with respect to such property, or to acquire any contract rights against each other. They are called "wrong-doers" and the property "the fruits of iniquity," sometimes in cases where the suit is on a subsequent contract, on a new and lawful consideration, and for a lawful purpose, though having for its subject-matter property which was, it is true, the gains of unlawful traffic, but which has since been the subject of honest trade.

It may be well, therefore, briefly to discuss and illustrate this rule.

The illegality of an agreement lies in its consideration and its purpose.

If A hires B with money or property to do an unlawful act, and pays him in advance, no taint of illegality infects the money paid. And the consideration, (which is not the money but the *act* of payment,) in itself colorless, is made unlawful solely by the unlawful purpose of the parties—viz., to effect the commission of an unlawful act.

So, if A places money or property in B's hands to be used in the commission of an unlawful act—as the bribery of a legislator. In each case the delivery of the money or property to B is unlawful because made for an unlawful purpose, and B's promise in either case is void both because based on an illegal consideration, and because itself a promise to do an unlawful act, a promise that could not be valid even if

made upon a lawful consideration, *e. g.*, a subsisting indebtedness on a prior loan.

And so where B promises to do an unlawful act, and A, in consideration thereof, promises to pay B, upon performance, a sum of money, or to divide with him the money or property which A may acquire by means and as a result of the unlawful act. Here A's promise is void because of the illegal consideration—B's unlawful promise—and because made with an unlawful purpose, viz., to secure the doing of an unlawful act.

But no illegality inheres in the money paid or property delivered, in any of these cases, or in the property acquired by the unlawful act.

The money or property paid or delivered in advance as the price of an unlawful act may be the subject of lawful contracts by the receiver, either before or after the doing of such act. If money, he may lend it and take a note, and the note (if it has no other defect) will be valid. If property other than money, he may make a valid contract to sell it, which he can enforce against the buyer.

And so the money or other property realized by the parties, or either of them, to an illegal agreement, from an unlawful act, or from a series of unlawful transactions amounting to a business, in execution of the illegal agreement, may become the subject-matter, or its payment or delivery may become the consideration, of lawful contracts.

Thus if A and B agree to defraud C, or to carry on an unlawful business, and put their agreement into execution, and accomplish the fraud on C, or conduct the unlawful business, and realize money or property thereby, they may lend the money or sell the property, or either of them may lend or sell the share he has received of the money or property, to a third person, and the contract of loan or sale will be valid, if made for a lawful purpose.

And as the money or property so realized may become the

subject-matter, and its payment, delivery or conveyance the consideration, of subsequent valid contracts with third persons, the same money or property may become the subject-matter, and its payment, delivery or conveyance, or an agreement to pay, deliver or convey it, may become the consideration, of a valid contract between the parties to the original illegal agreement themselves. The property is not tainted, nor are persons who have made an illegal agreement precluded thereby from carrying out former lawful contracts, or making future contracts, even with each other, even concerning the fruits of an unlawful act done, or an illegal business carried on, in execution of the illegal agreement.

Of course, such contracts are subject to the same conditions as other contracts. They must be on a legal consideration and for a lawful purpose.

The *first* condition would exclude all contracts having no other consideration than the illegal agreement, or the original consideration or promise of that agreement. For instance, if A hires B to obtain for him a government contract, and promises to pay him one half the profits realized on such contract, and the contract is obtained and executed, and results in a profit to A of $10,000, and A, instead of paying B $5,000, according to agreement, gives him his note for that sum. The note having no other consideration than that for A's previous promise (which was illegal) has no consideration at all, and is not a valid contract.

But supposing that A pays B the $5,000, and the next day, being in sudden need of money, borrows the same money from him, giving his note for its repayment, the note is good.

And it would seem that the case would not be different, if before the completion of the government contract—before the "illegal transaction had been completed and closed," the parties should agree on $5,000 as the sum that should be paid B, and A should pay it—whether out of money received

from the government or not—and the next day, being applied to by a friend for a loan, should borrow the same money from B, lend it to his friend, and give B his note. No reason is apparent why the note would not be good.

The *second* condition would exclude any contract made for an unlawful purpose, wnether to carry out the unlawful transactions contemplated by the original agreement or not. And since, when those transactions or that business is closed, a new contract is hardly capable of aiding to carry out the unlawful purpose of the original agreement, contracts subsequently made are less open to suspicion on that ground. But if it clearly appears that a contract on a valid consideration was not made in aid of the unlawful purpose of the original illegal agreement, or for any other unlawful purpose, it can make no difference in its validity whether it was made before or after the unlawful business was closed.

Again: Parties forming an illegal agreement for a partnership in an unlawful business—*e. g.* conducting a lottery —may, during the continuance of the business or after its close, invest a part of the profits in real estate, taking title in their individual names, as tenants in common. Or they may make such profits the capital stock of a new partnership, formed by themselves alone or with a third partner, for the transaction of a lawful business. And while they are still carrying on the lottery business, one of them may file his bill against the other for partition of the real estate, or may file his bill for an accounting of the business of the new partnership and a division of the profits. In neither suit would plaintiff's title or right to relief rest on the illegal agreement for the lottery partnership, or on any of the transactions of that business. In one case, his title would rest on the deed of the land from the common grantor; in the other, on a contract for a partnership in a lawful business. In neither case would it be any answer to the bill to allege that the property involved was affected with the taint of illegality

by reason of the lottery partnership agreement or the business done under it; and in neither case would an inquiry into those matters be necessary or permitted. And hence, it appears that there are cases resting on rights of property —*jura in re*,—or where the suit is brought to enforce a perfectly valid contract, where a court of equity may make what is in effect "a division among wrongdoers of the fruits of their iniquity," while the same court would, on principle and authority, reject a suit for accounting and division of profits of the lottery business, even after it was closed; for in such a suit the plaintiff's only title and claim to relief would rest on the illegal and void agreement for the lottery business, and *to decree such an accounting would be to enforce the executory provisions of an agreement illegal, utterly void, and, in legal contemplation, no agreement at all.*

The distinction between suits to enforce the executory provisions of an illegal agreement and suits to enforce executory contracts on lawful considerations and for lawful purposes, but of which the profits of the unlawful transactions under the illegal agreement form the subject-matter or enter into the consideration, or growing out of the payment of the losses in such illegal transactions, might be illustrated by instances almost infinite in their variety. In several English cases which have occasioned must discussion and some controversy in this and other courts, this distinction has been applied in cases differing somewhat in their facts from the instances we have put. Those cases will be considered at a further stage of our argument.

3.

From the foregoing discussion, it appears that—

1. The test of the validity of an agreement dealing with the proceeds of unlawful transactions had under an illegal agreement is not at all, whether the unlawful transactions are completed and closed, but solely whether the new agree-

ment is on a valid consideration and made for a lawful purpose.

2. Where two parties make an agreement for the transaction of business on joint account with third persons, and those transactions are had and result in profits which come into possession of one of the parties, and the other brings suit to recover his share as fixed by their agreement, the question is *not* whether such transactions with third persons were lawful or unlawful, or whether they are closed, but solely whether the agreement between plaintiff and defendant, in the execution of which the transactions were had and the profits realized, was, in its inception, a legal or an illegal, a valid or a void, agreement.

And as the making of an illegal agreement does not preclude the parties from making subsequent lawful contracts in respect of the profits realized from unlawful transactions with third persons in execution of the agreement, so conversely—

D.

*Fourth.*

The circumstance that property has been acquired by parties (or one of them) to an illegal agreement, by means and as the fruit of unlawful transactions with third persons in execution of such agreement, will not preclude such property (1) from becoming, upon its acquisition, *ipso facto*, subject to the provisions of a subsisting legal contract between the parties to such illegal agreement, and made prior thereto; or (2) from becoming in like manner subject to rights of the parties arising from a common or joint ownership, existing prior to the illegal agreement, of the property by the use of which in the unlawful transactions the fruits of such transactions have been realized.

(1) The first branch of the rule is illustrated by the case of a banking partnership, formed to do a lawful business,

which makes usurious loans, or of a firm of livery-stable keepers who let horses on Sunday; the loans having been repaid, and the hiring paid for, the money so received is to be treated just as if derived from lawful transactions.

(2) Instances of the second class would be a house owned by tenants in common and let for unlawful purposes. The rent being paid to one co-owner, the other may sue for and recover his share.

And so where a vessel owned by several is employed in illegal freighting, and one part-owner receives the freights. He must account therefor to the others.

The reason is plain. In each case the money has arisen from unlawful transactions, but plaintiff's *title* to a share of it is not founded on those transactions or on any illegal agreement, but on his title to the house or the ship.

It is clear that the cases under this fourth rule stand on the same ground as those under the third, viz.: that an illegal agreement does not taint anything not embraced in it or founded on it, and for this reason does not deprive a party to it of any rights, whether incident to ownership of property, or growing out of prior or subsequent independent contracts of the parties with third persons or with each other.

This is strongly stated by Chief Justice Marshall, in *Armstrong* v. *Toler*, 11 Wheat. 258, 269–270.

This fourth rule is abundantly sustained by a series of English cases arising on the statute 39 & 40 Geo. 3, *c.* 99, in regard to pawnbrokers. This act requires that the name of every partner in a pawnbroking concern shall appear over the door of the premises, and be inserted in the license and the pawn-tickets, etc. The cases mentioned are suits for partnership accounting between pawnbrokers. In each case it was the fact that the name of the partner by or for whom an account was sought did not at any time appear in any of the places where the law required it to appear, so that the

business in fact done was in contravention of the act. In the first case it was settled that an agreement for a partnership in carrying on the business contrary to the act would be illegal, and would confer no rights on either party; bnt that if the parties, when making the original partnership agreement, did not make it for the purpose of carrying on a secret partnership, the validity of the agreement and of the partnership, and the rights of the partners, would not be affected by the fact that some or all of the business of the partnership was illegally done.

Of course, the partnership articles, where there were any, would not express the illegal purpose, and in that case the inquiry was as to the existence of a contemporaneous collateral agreement for secrecy.

The first of those cases was *Armstrong* v. *Armstrong* and *Lewis* v. *Armstrong*, 3 Mylne & Keen, 45, (1834,) before Sir John Leach, M. R., and, on appeal, before Lord Brougham. An issue as to the fact whether, in making their original agreement, the parties contemplated a secret partnership, was sent for a trial at law, and the decision in the Exchequor Chamber on the exceptions at the trial is reported, *Armstrong* v. *Lewis*, 2 Cr. & Mees. 274.

In a passage quoted in our original brief, Lord Brougham says, (3 Myl. & K., 64:)

"If a person agrees with another to be a secret partner in the business of a pawnbroker, he agrees to do that which is illegal and punishable by 39 & 40 Geo. 3, *c.* 99, an act containing provisions highly beneficial, and bringing the trade in question under regulations which are wholesome to the community. * * * Any agreement of this sort, therefore, is unlawful, can convey no rights in any court to either party, and will not be enforced by decisions at law or by decree here in favor of one against the other of persons equally culpable."

And he goes on to say:

"If, as in the present instance, we have before us a contract of partnership wholly silent upon the statutory obliga-

tion to make the names public over the door, we have no right to argue from the omission that an infraction of the law was intended; on the contrary, we are rather bound to believe that the compliance with the law, being taken for granted as a matter of course, was not expressly mentioned in the articles, as being thought superfluous.

"*If, again, such a contract, legal in itself, has been made, nothing done afterwards, how illegal soever, can operate to make the contract unlawful.*

"But where the acting of the parties is illegal; where, the contract being silent, the law is broken under it, though not by force of it, there arises a very natural suspicion that the written articles, though true as far as they go, do not contain the whole truth, and that another agreement was entered into, collateral to the one in writing, and to which the illegal acting may be referred."

And, after examining the evidence, he says, (p. 67:) "the existence of both agreements, the open and the secret, is clear, and they were parts of one contract wholly illegal."

In *Gordon* v. *Howden*, 12 Cl. & Fin. 237 (1845,) the same question was presented. It was conceded that the plaintiff's name never appeared in the conduct of the business, and that all the business was unlawful, and the only dispute was as to whether the *contract* of *partnership* "was a secret partnership for the purpose of carrying on the business of pawnbroking," and the lords, upon a review of the facts, held that "it was to be a secret partnership from the very terms of the contract." This case was decided by Lord Brougham, who heard *Armstrong* v. *Armstrong*, Lord Lyndhurst, before whom, as chief baron, *Lewis* v. *Armstrong* was tried, and Lord Campbell, who was on the losing side in those cases.

*Fraser* v. *Hill*, 1 Macqueen, 392, (1853,) was a like case. It was argued by eminent counsel for respondent that the exception taken at the trial was equivocal, because "it might mean either that the contract was illegal in its inception, or it might mean that, although not illegal in its inception, the mode of carrying it on had been illegal. *But the mere mode of carrying it on would not have been sufficient to make the*

*contract itself illegal.*" To which Lord Cranworth, (chancellor,) responded "*No—not though the illegality were ever so soon after the date of the contract.*"

And see pages 396, 397, 399, of the report.

## IV.

The cases upon illegal contracts which bear upon the cases of *Sharp* v. *Taylor*, *Brooks* v. *Martin*, and *Planters' Bank* v. *Union Bank*, may be divided into three classes.

(1)

Cases where the original agreement was illegal, and the plaintiff sues on the agreement to recover money or property resulting from the unlawful transactions contemplated by the agreement, and had in execution of it.

(2)

Cases where the plaintiff sues on an alleged lawful contract to recover the fruits of subsequent unlawful transactions had with third persons, as coming under the operation of the original lawful contract, or claims such fruits as are incident to his title to property acquired prior to the illegal transactions and which was used in carrying them on.

(3)

Cases where an illegal agreement has been made, but the plaintiff seeks to recover, not on that agreement, but on a subsequent collateral agreement, on a new consideration, made between the parties, or by them or one of them and a third person, relating to the subject-matter of the original agreement, or to property acquired or losses incurred by the parties to the illegal agreement in their transactions with third persons in the execution of it.

We now proceed to discuss the cases cited against us.

## V.

### The Case of Sharp *v.* Taylor, 2 Phil. 801.

The report of the case of *Sharp* v. *Taylor* does not expressly state that the agreement under which the parties bought and repaired the stranded American ship whose earnings and proceeds of sale were the subject of the suit, and which they sailed under an American register in the name of one Robertson, in fraud, as was alleged, of the navigation laws of England and the United States, was in any respect illegal. It says (p. 801) "The Victoria, an American ship, having been stranded off the port of Liverpool," and the agents of the owners having resolved to sell her by auction as she lay, "*the plaintiff and the defendant Taylor agreed to bid for her on their joint account, and, in case they became the purchasers, to repair her, refit her, and afterwards to resell her.*" This was a lawful contract for a lawful partnership, and would not be impaired by any subsequent illegal agreements or illegal acts. The freight earnings having come into defendant's hands, and the proceeds of the sale of an alleged sale of the ship being charged to be also in his hands, the plaintiff sued for an accounting and division.

To make the decision an authority for plaintiff, it must appear that the Chancellor considered that the original agreement of the parties was to buy the ship, etc., and sail her under a false register, and that such purpose was illegal.

If the original agreement was a partnership, and did not contemplate an illegal use of the ship, then, on principle, and within the authority of the pawnbroker cases cited, the subsequent illegal employment of her, by which the freight was earned, would not bar plaintiff's suit for an accounting and division of her earnings and the proceeds of her sale.

And if, by the original agreement to buy, the parties had

become merely part-owners, her earnings in illegal freighting, when paid, would belong to the parties as part-owners, and not by virtue of any title founded on an illegal agreement or transaction subsequent to the purchase. And even if the parties, being part-owners, made an unlawful agreement for a partnership, *not* in the mercantile, but in the carrying trade, this illegal agreement, being void, would not divest the parties, or either of them, of their right to the earnings, and, *a fortiori*, to the proceeds of sale, *not* as partners, but as part-owners.

The question passed on was the accounting as to freights and the proceeds if any of the sale of the ship in Taylor's hands — Robertson being out of the jurisdiction. And it appears that the court considered plaintiff's title at times to be that of a partner, and at times that of *part-owner*.* The court says (p. 814:) "All that the plaintiff can obtain is payment of what Taylor has received on account of the *joint adventure;* and for this purpose it is not material whether what was so received arose from freight and other profits due to Taylor and the plaintiff *as owners of the ship*, or from payments made or allowed by Robertson *on account of the ship*." On page 815, the parties are spoken of as *co-partners*." On page 818 he speaks of them as "*tenants in common*."

It would seem that the case was treated as a suit by one part-owner of a ship against the other to recover earnings and proceeds of sale, it being charged that the earnings were made in illegal carrying; but the illegality is not found, (the ship being not English,) nor is it found that the agreement under which the ship was sailed under a false register was intended as a partnership, or that it was illegal—nor would such finding be material, since plaintiff does not have to rely on such agreement, whether legal or illegal, but may stand on his original lawful title as part-owner or partner in the purchase.

* The plaintiff, in his bill, claims solely as part owner - that one half the freight was payable to plaintiff as bankrupt of the ship " P. 805

While the case does not involve the question whether one party to an illegal agreement may, *in a suit upon it*, recover from the other the fruits of unlawful transactions with third persons, the antecedent probability is almost irresistible that Lord Cottenham never meant to answer any such question in the affirmative. This case was decided in January, 1849. He was familiar with *Thomson* v. *Thomson*, (which he cites,) and must have been familiar with *Armstrong* v. *Armstrong*, and *Lewis* v. *Armstrong*. Indeed, as Master of the Rolls, he heard and decided a question as to costs in the latter case. 3 Mylne & K. 69. As Mr. Pepys, he had been successful counsel in a case in which the plaintiff and the two defendants agreed to buy a ship and to register and sail her in the names of defendants only, (contrary to statute,) but the profits to be divided among all; and it was *held* that the agreement was illegal, and a bill for an account of earnings was dismissed on demurrer. *Battersby* v. *Smyth*, 3 Madd. 110.

He had himself, as chancellor, in 1837, in a suit for accounting and division of profits of an unlawful business carried on under an illegal agreement for partnership, thus expressed himself:

"It is clear therefore that this contract of partnership was formed for the unlawful purpose of representing at the Surry theatre prohibited performances. * * * Can this court, under such circumstances, decree to one of the parties to this contract the specific performance of the agreement or any relief growing out of it? *To do so would be inconsistent with all principle, and contrary to all the decided cases*," many of which he reviews.

*Ewing* v. *Osbaldiston*, 2 Myl. & Cr. 53, 85. (1837.)

He must have been familiar with the decision of *Gordon* v. *Howden*, in the House of Lords, of which court he was a member.

Is it within the limits of belief that he could have intended to overrule all these cases—cases that were in the strictest

sense binding on him as authorities—and this without mentioning one of them except *Thomson* v. *Thomson*, while citing that one as authority in support of his reasoning?

An examination of the language used by him and quoted in *Brooks* v. *Martin* shows that he, at least, never supposed he was doing what he had once said "would be inconsistent with all principle and contrary to all the decided cases." He is considering the objection (under the English navigation laws) *not* that the parties in their original purchase or partnership intended a fraud on those laws or any others, but (p. 817) "that the *cargoes* on which the freight was paid, *having been imported* in the ship in question, which, though registered in America, the plaintiff and the defendant Taylor claimed to have an interest in, *such importation*" (not the purchase of the ship, or the partnership agreement, if any, under which she was bought and sailed) "*was contrary to the provisions of law*, and that no title can therefore be founded upon it. *This assumes that the plaintiff and Taylor had some interest in the ship*, and the plaintiff cannot, I think, in this suit repudiate such claim." And it appears that his lordship's difficulty in the case was not as to whether the plaintiff was proceeding on a valid agreement, but whether (the ship having been transferred to Robertson) plaintiff could assert a claim as part-owner. Thus, in considering the defendant's objection (p. 813) that "the ship never was the joint property of the plaintiff and Taylor, but belonged to an American citizen, named Robertson, in whose name she was registered in New York," he says, (p. 815,) "Whatever objections there may be to treating Sharp and Taylor as owners of the ship, there can be none as to their title as joint-owners of the bottomry bond, and, as such, to the proceeds of the ship." "But," he says, in answering the objection that the importation was illegal, "the answer to the objection appears to me to be this—that the plaintiff *does not ask to enforce any*

*agreement adverse to the act of Parliament,*" (but if his title to the freight—the only matter the court was considering—depended on an agreement for illegal partnership in owning and sailing the ship in violation of law, he *would* be seeking to enforce an illegal agreement,—"an agreement adverse to the act of parliament,"—and his lordship would have decided, as he had procured the court to decide in *Battersby* v. *Smyth*, and had himself decided in *Ewing* v. *Osbaldiston*, that the plaintiff could not maintain his suit.) "He is not seeking compensation and payment for an illegal voyage; that matter was disposed of when Taylor received the money, and the plaintiff is now only seeking payment for his share of the realized profit." (That is, as lawful part-owner he is seeking from his co-owner his share of the money received by the latter from an alleged unlawful use of the vessel; or, as member of a legal partnership, he is seeking from his copartner his share of money received by the firm and in the hands of that copartner. The money, it is true, was derived from transactions alleged to have been unlawful, but plaintiff's title to a share of it rests on a legal contract of partnership.) "As between the two can this supposed evasion of the law be set up as a defense by one against the otherwise clear title of the other?" (But if plaintiff's title rested on an illegal agreement, how would it be "otherwise clear," or "clear" at all, or a "title" at all?) "In this particular suit can one tenant in common dispute the title common to both?" (Recognizing plaintiff as lawful part-owner of the ship, and as such entitled to his share of the freight, however earned.) "Can one of two partners possess himself of the property of the firm, and be permitted to retain it if he can show that *in realizing it*" (*not* in the agreement for the pretended partnership) "some provision in some act of parliament has been violated? Can one of two partners in any import trade defeat the other by showing that *there was some irregularity in passing the goods through the custom house?*" (He does not say,

"Can one of two parties to a smuggling adventure, or to an agreement to carry on the business of smuggling, possess himself of the property smuggled, or its proceeds, and defeat the other's claim under the agreement, by showing that the agreement was illegal and utterly void?" The basis of his argument is the existence of a lawful partnership, founded of course on a lawful contract, and capable of having partnership property, but which firm has received, from unlawful transactions, money which one partner seeks to withhold from the other, *not* by denying the existence or lawfulness of the partnership, but by asserting the illegality of the transactions between that partnership and third persons by which the money was realized. If the original agreement was illegal, there could be no partnership, no partnership property, and no partner to appropriate it and exclude another from it.)

"The answer to this, as to the former case, will be that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do between those parties." (Here, too, it is clear that he refers to the "transaction" by which the ship earned the freight in controversy from third persons. The only thing in the case to which any illegality is imputed, even by defendant's counsel, is the transaction which is closed. No illegality whatever is imputed to any contract between the parties to the suit. *Those transactions* were closed when those persons paid the freight. He does not and cannot refer to the agreement (of partnership or otherwise) between plaintiff and defendant, upon which plaintiff founds his title to the money. *That* agreement is not closed, but remains open, and in part executory. It will not and cannot be closed until the money is divided, and the plaintiff is asking the court to close it. And if a partnership, it certainly is not "closed," so long as no account or division of profits has been had, and while one partner is prosecuting

his suit for an accounting and division of profits withheld by the other.)

He goes on to say: "The difference between enforcing illegal contracts and asserting title to money that has arisen from them is distinctly taken in *Tenant* v. *Elliott* and *Farmer* v. *Russell*, and recognized and approved by Sir Wm. Grant in *Thomson* v. *Thomson*." (He does not say that the distinction is such that the two may not be found in the same suit. Nor does he, *nor could he say* that there is *any* difference between enforcing an illegal contract and asserting a title *based solely on the executory provisions of that contract*, to money that has arisen under it.) "*The importation of goods in a ship American built* and not professing to have any English registry," (which is this case,) "*would not be illegal, and the American owner might assign the freight to any one.* Assuming this to be so, I am of opinion that, under the authorities referred to, Taylor, who received the freight on account of himself and Sharp, cannot set up this defense to Sharp's claim." (That is to say, the transactions in which this freight was earned were legal so far as English law is concerned. American law is a fact to be proved and has not been proved, (815–6,) and hence no fraud on those laws is shown. Therefore there is nothing illegal in the transactions by which this freight was earned. And as to plaintiff's title to the freight, it is true that the vessel was in Robertson's name, and perhaps he is to be deemed the owner. But if he was, and if he sailed the vessel illegally, still the proceeds of such illegal sailing, after he received them, he could dispose of as he pleased. He did assign them to Taylor for the use of himself and Sharp, and, Taylor having acquired the money by a delivery of it to him subsequent to the transactions supposed to be illegal, that delivery is a sufficient consideration for the promise, implied in his receiving it from Robertson to the use of himself and Sharp, to pay one-half of it to the latter.)

We repeat, for we are anxious to make as plain as possi-

ble a case which seems to have been much misunderstood, that nowhere in the statement of the case, in the arguments of counsel, or in the opinion of the court, is there any intimation or suggestion that plaintiff's title to one-half the ship and one-half its earnings and proceeds, was founded on any illegal agreement with the defendant.

The argument for defendant was, as to the proceeds of the ship, that the court could not look behind the registry, and she was registered in the name of Robertson. As to the earnings, they said, "The money plaintiff claims was earned in illegal freighting"—to which the court answers, "Granting that, still, money illegally earned is not in itself incapable of being the subject of valid contracts. The plaintiff is entitled on two grounds (1) because of the original lawful partnership contract and the purchase of the vessel by which he became part-owner. (2) Even if that title were divested by the registry in Robertson's name, (which is said to have been illegal, but I know nothing of that; it being an American ship, the false registry is not an infraction of English law, and you have not proved the law of the United States,) still the plaintiff and defendant, having taken from the master of the ship a bottomry bond for the money expended on repairs, are entitled to be paid out of the proceeds of the sale. And, as to the freight, even if plaintiff had no other title, it was competent for Robertson, if, as defendant says, he was owner of the ship, to do what he pleased with the earnings, whether earned in legal or illegal traffic. He put her earnings into defendant's hands, one-half for defendant's own use and one-half for plaintiff's use. The delivery of this money to defendant was a new and a valid consideration for a promise by defendant to hold it for plaintiff's use, and, if he made no express promise, the law will imply one."

The whole misconception as to this case has arisen in our judgment from the superfluity of reasons given by his lordship. In his argument he illustrates by instances under our

second class—a lawful partnership acquiring money by illegal transactions—and then in support of his argument he cites cases resting on the same principle, but where the contract on which plaintiff claims was made *after* instead of *before* the acquisition of the money. And by dwelling on the character of the transactions by which the money was earned, he brings those into undue prominence as if the question were, was the money earned legally? whereas the vital question is, does the plaintiff claim the money by a lawful title? And he shows lawful title in plaintiff by a valid purchase and contract before, and a valid contract after the close of the transaction by which the money was earned, which transaction, after all, he does not see any illegality in.

The case of *Thomson* v. *Thomson*, cited by Lord Cottenham, and the fact that he cited it, show that he could not have supposed that he was entertaining a suit by one party to an illegal partnership agreement, *founded solely on that agreement*, for a share of the property acquired by the parties, in execution of the agreement, by means of completed illegal transactions.

In that case G agreed to sell to W the command of an East India ship, in consideration of an annuity of £200, to be paid to G by W so long as he should retain command, and on his retirement the annuity to be commuted for a gross sum, to be fixed by disinterested persons. This agreement was against public policy, and was illegal, but was carried out by the transfer of the command and the payment of the annuity until W resigned. On his resignation, under the rules of the East India Co., the sum of £2040 was paid by the company to W's agent. G filed his bill to reach this money. The bill was dismissed, Sir Wm. Grant saying in words strikingly applicable to the case of this plaintiff:

"You have no claim to this money except through the medium of an illegal agreement, which, according to the determinations, you cannot support. If the case could have

been brought to this, that the company had paid this into the hands of a third person to the use of the plaintiff, he might have recovered from that third person, who could not have set up this objection as a reason for not performing the trust. *Tenant* v. *Elliott* is, I think, an authority for that. But in this instance it is paid to the party, for there can be no difference as to the payment to his agent. Then, how are you going to get at it except through this agreement? * * * *Here you cannot stir a step but through that illegal agreement,* and it is impossible for the court to enforce it."

And note that "the transaction alleged to be illegal"—the sale of the command—had long been "closed." And, moreover, the money was not acquired by illegal transactions under the agreement. It was unlawful for W to buy the command of his ship, but it was not unlawful for him, having bought it, to command her faithfully and earn his retiring allowance.

*The case shows that it is entirely immaterial whether money which is the subject of a contract, or is sought to be brought under the operation of a contract, was acquired by right or by wrong, the one vital question being, Is the agreement by which plaintiff claims the money legal or illegal?*

The other cases cited in *Sharp* v. *Taylor* are also cited in *Brooks* v. *Martin* and in *Planters' Bank* v. *Union Bank*, and will (with others) be more conveniently discussed in connection with those cases.

And our position that Lord Cottenham never meant to assert the doctrine for which plaintiff contends is further sustained by a consideration of the arguments he uses. According to plaintiff's construction of the opinion, his lordship's reasoning is not what we should expect from a judge of such high repute. Let us examine it, as interpreted by plaintiff.

The conclusion reached is than an agreement, illegal when made, because providing for or tending toward the commissios of unlawful acts, and, therefore, in its inception utterly

void, will, if carried out by the commission of those unlawful acts, and the acquisition thereby of money by one of the parties, become so far valid as that it will give to the other party the same right to a share of the money that he would have had if the agreement had been a legal one in the first instance.

This is sufficiently startling. But why limit the vivifying effect of wrongdoing to successful illegality? Why should unlawful acts which result in profits be more efficacious in legalizing an illegal contract than the same acts when resulting in losses? Yet we believe that no suit has as yet been sustained by one party to such an agreement against another for contribution for losses in doing illegal acts under the agreement. This court, in *Bartle* v. *Coleman*, 4 Pet. 184, emphatically denied any legalizing efficacy to unprosperous wrongdoing.

And why should it be limited to cases of partnership or a joint enterprise? Why should not the successful completion of the illegal transactions by an agent entitle him to his reward? And why should his principal retain the fruits of the employment, and refuse to compensate the agent for his services? Supposing the agent is to be paid out of the profits. Suppose that in *Tool Co.* v. *Norris*, the agent was to get nothing unless the company made a profit out of its government contract, nor until the contract was completed and the supplies all delivered and paid for, and was then to receive a percentage of the profits. Here the two conditions requisite to validate an illegal agreement have been complied with. The illegal transactions to accomplish which the agreement was made have been completed and closed. They will not be affected by anything the court can do in a suit between the agent and the principal. The government has made no complaint, and the illegal transactions have been fruitful of profits. Why should the company be allowed to retain them all to itself, and defeat the claim of the agent for his share

of them, fully earned by his (to it) faithful, and certainly valuable and indispensable services—on the plea that in the transactions connected with the obtaining of the contract, or in the making of the original agreement of hiring, some rule of public policy has been violated?

Is not this a fair application of Lord Cottenham's reasoning as construed by plaintiff? And is there any ground on which a division can be had between partners which is not equally applicable as between principal and agent? But can there be the slightest doubt but that in case of such a suit by an agent, this court and every court would, in spite of the agreement, deny any such efficacy to successful wrongdoing? And must there not be a radical defect in reasoning that can lead to such results?

The fundamental error lies in the assumption that an agreement originally illegal because against public policy can be made legal by any action of the parties. But the further assumption that it becomes legal, and the courts will entertain suits to enforce rights under it, upon, but not until, the completion (if profitable) of the illegal acts under it, *and because of such completion*, is, if possible, yet more erroneous.

It is supposed to be well settled that the purpose of the rule of policy avoiding *ab initio* agreements because of their tendency, is to prevent the commission of the unlawful acts to which they tend. But in cases where the rule has been ineffectual to prevent the making of the agreement, the law aims to prevent it from being carried out by giving the parties a *locus pœnitentiæ*,—an opportunity to withdraw from it. And to this end either may, before the illegal acts are done, maintain a suit to recover whatever money or property he has delivered to the other under it. But this is the only suit founded on such agreement that the law, as heretofore interpreted, permits either party to bring against the other, and this must be brought before the doing of the unlawful acts,

and is allowed to be brought only because *in disaffirmance* of the unlawful agreement.

The old rule was not, the new rule ought to be, difficult of application. But an attempt to apply both rules to a given case might work strange results. Let us imagine a case had been brought before Lord Cottenham, for, as the supposed author of the new rule, he would be best qualified to administer it. Three men, A, B, and C, have made an illegal agreement to commit a series of frauds. Each has contributed funds to the common enterprise which has been successfully launched and promises abundant returns. The money has been placed in C's hands, several fraudulent transactions have been entered upon, but no one of them has been completed, though some profits are supposed to have been realized. C ousts his partners from the management of the business, assumes entire control of the funds, and refuses to the others any information. A, becoming discouraged, and perhaps conscience-stricken, wishes to retire. B, of sterner stuff, wishes to bring C to terms. A files his bill to rescind and to recover his investment. B files his bill—or his cross-bill—to establish his rights as a partner and to compel an account. The cases come on together, on demurrers by C.

His lordship must have said to both plaintiffs: "This contract of partnership was formed for unlawful purposes. Can this court, under such circumstances, decree to one of the parties any relief growing out of it? To do so would be inconsistent with all principle and all the decided cases. I so held in *Ewing* v. *Osbaldistone*, 2 Mylne & Cr. 53. To be sure, A desires to rescind and withdraw his contribution, but his bill shows that the enterprise has been launched. The time for repentance is passed, and his bill is filed too late. As to B's bill, the case shows that the partnership is formed for purposes of fraud, and that though several promising frauds are *in fieri*, not one fraudulent transaction has been completed and closed, and the case is therefore not within

*Sharp* v. *Taylor*. His bill is premature. Let both bills be dismissed, without prejudice to the filing of a new bill by either plaintiff, when the fraudulent transactions shall have been completed and closed, for a full account and a division of the profits."

Would any one have been readier than Lord Cottenham to repudiate any interpretation of his opinion in *Sharp* v. *Taylor* which could lead to such a result as this? But we submit that the construction put upon it by plaintiff's counsel—and no other construction can make it of any avail to them whatever—does necessarily and inevitably lead to such results. And while the results show that the case has been misconstrued, they show also that, if not misconstrued,—if it means what plaintiff's counsel claim that it means,—no time should be lost in overruling it.

## VI.

### The Case of Brooks *v.* Martin.

*Brooks* v. *Martin*, 2 Wall. 70, next claims attention. This case was decided principally on the authority of *Sharp* v. *Taylor*, the court saying (p. 81) that "the principle is the same in both cases, and the analogy in the facts is so close that any rule which should govern the one ought also to control the other." The court adopts the reasoning of Lord Cottenham which we have quoted, supplementing it with similar arguments.

The circumstance that *Sharp* v. *Taylor* was thus accepted as authority in this court is an additional and controlling reason that the construction put on that case by plaintiff's counsel is not correct, for this court would never have accepted as authoritative a case which, on that construction, is in conflict with every preceding and following case, and is vicious in its reasoning and in its tendency.

It is true that the construction against which we contend has not unfrequently been put upon *Brooks* v. *Martin*, but not, as we expect to show, by this court, notwithstanding *Planters' Bank* v. *Union Bank*. And this construction has made the case a stumbling-block, has led to its being silently disregarded by some courts, criticised, or distinguished and explained away by others, and blindly followed in a few cases.

There are several supposable states of fact—several theories of the facts—in *Brooks* v. *Martin*, besides that which would make it a suit, founded solely on an illegal agreement for a partnership, for an accounting and division between the partners of the profits accrued from unlawful transactions in execution of the agreement.

Thus, if the original partnership agreement had been illegal, and the business done under it wholly illegal,—consist-

ing merely of the buying of claims,—but the results of that business, having come into the hands of the parties, had by them been used as the capital of a new partnership legally formed for the lawful purpose of dealing in land-warrants and the lands to be thereby obtained. Any suit for accounting and division of the land-warrants and lands on hand, or of the proceeds of warrants and lands sold, would be founded on the new and legal, and not on the original and illegal, partnership agreement. If the parties in *Brooks* v. *Martin* had done anything of this kind, the case was rightly decided. The report of the case, however, does not expressly show any such agreement, nor does it, as we read it, show that the court considered the facts as warranting the inference that such agreement had been made.

Again, supposing that when the land-warrants were issued, they were assigned to the parties in their individual names, with no suggestion of a partnership, and that each patent issued on location of a warrant had run to all the parties as grantees, so as to make them, on its face, tenants in common, holding the legal title. And suppose that the parties, or one of them, under power of attorney from the others, had made sales of these lands or warrants. There would be nothing to prevent a suit by one of them against the other, who made the sales, and had the proceeds in his possession, for an accounting and division of such proceeds, and a sale or division of the unsold lands and warrants. In such a suit the plaintiff would not found his title on the illegal agreement, nor would it be a suit to enforce that agreement. His title would rest on an assignment of the land-warrants to the partners in their individual names, and, as to the lands or their proceeds, on patents from the United States, each issued to himself by name with the others. The taking of land-warrants and patents to the parties as owners in common would be just as much a division of the proceeds of the business done under the illegal agreement,—just as much a putting

each one into possession of his share of those proceeds—as if the proceeds, being in money, had been counted out and divided among the parties, and each party had put his share into his own pocket; after which reduction to actual possession, he could undoubtedly deal with it as with money derived from sources the most pure.

The report of the case does not state whether the warrants were thus assigned, but it must we think be inferred, from the ordinary course in such things, that the patents from the United States, at least, did run to the parties in their individual names. And the addition of any description of the parties as partners, etc., while it might be *evidence* to show a subsisting partnership, would not, if there were in fact no subsisting partnership, (and a partnership under an illegal agreement is no partnership,) bring the lands conveyed under the operation of any partnership unless *a new one*, under an agreement expressly proved or to be inferred from the fact of taking conveyances with such a description, and the subsequent dealings with the property.

Of course, in such a suit it would make no difference what was the state of the accounts between the parties under the original illegal agreement, when the title to the lands thus vested in them. In law they had no accounts, and moreover their title rests and must rest on the warrants and patents, (as the case may be,) and on those alone. And as tenants in common or as partners in a new firm, they are entitled to their shares of the common or the partnership property, irrespective of any supposed demands that one may have against another founded on any utterly void agreement.

There is, then, nothing in the facts of the case of *Brooks* v. *Martin*, as reported, which precludes a suit for an accounting and division, based on the title, and to be had on the principles we have indicated.

A third theory of the facts in *Brooks* v. *Martin*—a theory which the report goes far to bear out, if not completely es-

tablish—is that the case was regarded by the court as a suit for an accounting and division, between partners in a lawful contract of partnership, of the profits of an unlawful business carried on by the partnership. Thus viewed, the case is clearly right on principle, and in line with the English pawnbroker cases.

The report states that the parties entered into articles of partnership for "the purchase and sale of bounty land-warrants that have been or may be issued under the law of congress." True, the reporter says that this was "the *ostensible* object of the firm," but our present concern is with the view taken of it by the court. And it is also true that it was competent to show a collateral agreement or purpose of the parties, *when making the partnership agreement*, that its business should be the illegal one of buying soldiers' claims, and if such were shown, the partnership agreement would be illegal and void. But it is also true that such illegal purpose is not to be presumed, but should be fairly made out by evidence. And the report, while it states (p. 75) that the defendant pleaded that the statements of the articles of partnership "did not show the true purpose of its formation, nor the business which it really transacted; but that the partners intended and really did engage in buying up the *claims* of the soldiers * * * long before any scrip or land-warrants were issued by the government (a fact of which," says the reporter, "there appeared by the evidence to be no great doubt;) that this was an illegal traffic forbidden by the act of congress * * * and against public policy; that, accordingly, the plaintiff could have no relief." This statement is open to the same objection: (that it is equivocal) that was made to the exception in *Fraser v. Hill*, 1 Macqueen, 392. Two facts are pleaded in the answer: (1) that the agreement for a partnership was made for an unlawful purpose, and (2) that the business actually transacted was illegal, "a fact of which there was no great doubt." But which of the two

facts was thus established? Grammatically, the words "a fact" should refer to the last of the facts stated, viz., that the business was illegally transacted, in which case the reporter's statement contains nothing to show that the partnership was illegal in its inception, nothing to show that the illegal collateral purpose or agreement was not subsequent to and distinct from the partnership. And as the written agreement should be deemed to express the purpose of the parties till the contrary is shown, and as illegality is not to be presumed, and as the mere mode of carrying out a lawful contract "would not have been sufficient to make the contract itself illegal—no, not though the illegality were ever so soon after the date of the contract," (*Fraser* v. *Hill*, 1 Macq. 392–3,) we say that on the reporter's statement of the facts, the case is a case of a legal partnership doing an illegal business, and not a case of a partnership agreement illegal in its inception, and hence void *ab initio*.

In the argument for defendant, it was insisted that the original agreement was illegal, but that does not show that it was proved to be so, or was so regarded by the court.

We come now to the opinion. Bearing in mind that the inefficacy of an illegal agreement to confer any rights as between parties to it *in pari delicto*, is among the axioms of the law; that according to all preceding cases, if the original agreement were illegal, the suit, so far as it sought an accounting and division—and this was the gist of it—would not lie; and that no man better understands the use of language or can express himself more clearly or more forcibly than Mr. Justice Miller, we should certainly expect that if he considered the partnership agreement illegal, and yet meant to hold that, notwithstanding such illegality, a suit for account of profits under it would lie between the parties to it, he would have stated both these conclusions in terms incapable of misconstruction.

The opinion seems to have been delivered *orally*, and not to be reported *verbatim*.

"Mr. Justice Miller, stating the facts of the case as he proceeded, and showing that its different parts were proved by the testimony, delivered the opinion of the court *to the following effect:*

"We think that in point of fact the allegation of the answer *that the traffic in which this firm engaged* was the buying up of soldiers' claims * * is true. We have as little doubt that *the traffic* was illegal." Now, as has been seen, the answer contains *two* allegations: (1) that the partnership was formed to deal in soldiers' claims, (2) that the partners did engage in the business of dealing in soldiers' claims. *The last allegation only is found by the court to be true.* The court does not find that the first allegation was true; and if the court thought that this was a suit for profits arising under an agreement for partnership illegal in its inception, the fact thus found would have been plainly stated.

Again, "the traffic in which *this firm* engaged"—that is the business done by this lawful partnership; for if the agreement for partnership was illegal, there was no "firm."

It is true the court says: "If Brooks, after the signing of these articles of partnership, had said to Martin: 'I refuse to proceed with this partnership because the purpose of it is illegal,' Martin would have been entirely without remedy." But this view of the purpose of the partnership, as it is imputed to Martin, cannot fairly be twisted into a declaration or even an intimation that the court deemed the purpose of the partnership *in its inception* illegal. "After the signing of these articles" needs not to mean immediately after, but rather at such subsequent time as the firm determined to deal in claims, but before they had done so. A partner in a lawful partnership might naturally refuse to engage in an illegal traffic, but it would not be natural for one who, with an illegal purpose, has signed an illegal agreement,

at once to refuse to go on with it because of such illegal purpose. And besides, no partner in any partnership can have any remedy against another who, before the business is begun or while it is in progress, totally refuses to go on with the partnership—that is withdraws from it, provided no time were limited for its duration. But if a partner in a lawful firm refuses, while remaining in it, to take part in a business within the scope of the partnership agreement, even if not contemplated when the agreement was made, his partners, if damaged by the refusal, would have a remedy, provided such business were lawful, but not if it were unlawful.

Hence the illustration used is that of a partner in a legal partnership refusing to enter on a business, whether within or without the scope of the partnership agreement, but not contemplated in its formation, and refusing because such business is unlawful.

And in any case, a mere illustration used by the court in delivering what seems to be an oral opinion is entitled to much less weight than the other matters we have pointed out.

Again: "When the bill in the present case was filed all the claims of the soldiers *thus illegally purchased by the partnership*"—*not*, thus purchased *by the illegal partnership* —"had been converted into land-warrants, and all the warrants had been sold and located. The original defect *in the purchase*"—*not*, in the *partnership*—"had, in many cases, been cured by the assignment of the warrant by the soldier after its issue." This shows that the question considered was *not* whether there was a partnership, but whether that partnership had property that could be divided. The assignment of soldiers' claims was a nullity, and, as the court holds, illegal. No court could treat them as property—any more than lottery tickets or counterfeit money—and decree a division, even among members of a lawful firm, nor entertain a

suit where such firm owed nothing and had no other property.

And the court goes on to speak of the results of the "*partnership* business," and asks: "Does it lie in the mouth of *the partner* who has, by fraudulent means, obtained possession and control of all those funds, to refuse to do equity because of the wrong originally done or intended to the soldier?" Here, too, the court bases its reasoning on the assumption of a lawful partnership, and the duties of partners to each other arising out of such lawful contract, (and none such can spring from an illegal contract,) and meets an objection based, not on the illegality in the formation, but on the illegality of the business of the partnership, as that in originally buying the claims, (not in originally forming the partnership,) some wrong was done or intended to the soldier. And so the purpose of the statute will be best served by "requiring him to execute justice between himself and *his partner*."

And the court asks: "What rule of public morals will be weakened by compelling him to do so? * * The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the court in this case."

Here, too, it is evident the court has in mind illegal transactions of a lawful partnership with third persons. Those transactions *are* "accomplished facts." They "cannot be affected by any action of the court in this case." But if the original agreement for partnership was illegal, the complete carrying out of *that* transaction remains to be effected. It is not an "accomplished fact," and will be very seriously affected by the action of the court, according as the court recognizes its validity and enforces it by according to plaintiff the rights claimed under it, or denies the existence of any such rights. The rule of public morals which avoids illegal agreements does not and cannot extend to attaching any

stigma to the money or property which is the subject-matter or the fruits of them, and is not violated if that money or property is brought under the operation of a subsisting lawful contract, or becomes the subject-matter or enters into the consideration of a subsequent lawful contract. But to say that in a particular case a court will recognize and give effect to rights claimed by one party to an illegal agreements against another, and resting solely on the executory provisions of such agreement, merely because the unlawful acts to which that agreement tended have been done and cannot be undone, is to assume that the purpose of the rule of public policy is to redress the particular wrong done to others in the special case in which it is invoked, not to prevent similar wrongs in other cases. Refusing or granting the relief asked in *Bartle* v. *Coleman*, or *Wheeler* v. *Sage*, or *Norris* v. *Tool Co.*, could not undo any wrong done to third persons. But refusing a recovery in those cases and all cases of illegal agreements is believed to have a tendency to prevent in the future the making of such agreements and the evils to which they tend. And for this reason, and this reason only, the law makes an illegal consideration insufficient to support a contract, makes an agreement on such consideration or with an unlawful purpose utterly void in its very inception and at all times as between the parties to it. Hence the remarks of the court would be irrelevant and ill-founded, if the suit were regarded as founded on an agreement for partnership illegal and void *ab initio*.

The residue of the opinion in *Brooks* v. *Martin*, so far as bearing on the present question, consists of a statement of the case in *Sharp* v. *Taylor*, a statement that the cases are alike in principle and closely analogous in their facts, (which, of itself, is fatal to any assumption that the court regarded the original agreement for partnership as illegal,) and a quotation of the reasoning which Lord Cottenham, in that case, basis on the fact that the illegal transactions have been

completed and closed. This reasoning we have discussed sufficiently in considering that case.

It is a noticeable fact that no mention is made, by counsel or the court, of the very leading case of *Armstrong* v. *Toler*, 11 Wheat. 258, in which the law in regard to illegal agreements and to subsequent valid contracts relating to the subject-matter of illegal agreements received a lucid exposition by Chief Justice Marshall. Had the court in *Brooks* v. *Martin* deemed that the suit was founded on an agreement for partnership illegal and void in its inception, they would hardly have left out of sight a case so important, especially if intending substantially to overrule it.

We submit, then, that the case of *Brooks* v. *Martin* was and was understood by the court to be the case of a lawful partnership engaged in an illegal business, the fruits of which were sought to be brought under the operation of the previously-made and entirely lawful contract of partnership. And, being such a case, it is in full accord with principle and the authorities, but lends no aid to the contention of the plaintiff in this case.

Before proceeding to consider *Planters' Bank* v. *Union Bank*, it may be not amiss to note the reception which *Brooks* v. *Martin*, has received in several of the leading state courts.

In *Snell* v. *Dwight*, 120 Mass. 9, and *Dunham* v. *Presby*, Id. 285, (1876,) the court, in a suit by one party to an illegal partnership agreement against the other, for an account of resulting profits, refused any relief, thus denying the doctrine imputed by plaintiff's counsel to *Brooks* v. *Martin*. On page 17, the court thinks that *Brooks* v. *Martin* and *Sharp* v. *Taylor* "relate to subsequent or collateral contracts or transactions, in which the original illegal acts and contracts are held to form no part of the consideration." (As we have seen, the case may stand on that ground.) On pages 18 and 19, however, the court evidently finds great difficulty in explaining the case, and attaches some importance to the fact that

the suit was brought to set aside the sale from *Martin* to *Brooks*, and not on the original agreement. True as to the sale, but after the sale was set aside, Martin could have an accounting of partnership property only by virtue of some valid contract of partnership on which his very *status* as partner must depend.

In *Woodworth* v. *Bennett*, 43 N. Y. 273, (1870,) Church, C. J., considers that *Brooks* v. *Martin* is a case where a lawful firm has received funds from an illegal business, and that in such a case "it may be that a division will be enforced by virtue of the rights of the members under the contract of partnership. This is the utmost limit to which the rule can be carried." In the case before the court relief on an illegal partnership agreement in respect of profits of completed illegal transactions, was refused because of the illegality in the original agreement.

In *Watson* v. *Murray*, 23 N. J. Eq. 257, (1872,) and in *Todd* v. *Rafferty*, 30 N. J. Eq. 254, (1878,) the case of *Brooks* v. *Martin* was considered in the court of chancery, and in *Wilson* v. *Gregory*, 36 N. J. Law, 315, (1873,) it was considered by the supreme court, of New Jersey.

In the first case (a suit for accounting of a lottery partnership, legal in the state where formed,) the court says (p. 262) of *Sharp* v. *Taylor* that "the partners did not enter into partnership to carry on an illegal business, nor, so far as appears, to violate the law in the prosecution of a legal one. Some part of the partnership gains appeared to have resulted from a breach of positive law. The court directed an account of the whole." *Brooks* v. *Martin* is treated as merely a case where "the business of the firm related to * * a traffic which the act of congress prohibited," and is further distinguished by the fact that the traffic was merely illegal, and not criminal. *Watson* v. *Murray* is cited as authority in *Oscanyan* v. *Arms Co.*, 103 U. S. 277.

In *Todd* v. *Rafferty*, the same court refused to compel the

executors of a deceased partner in a lawful firm to account to the survivor for profits of an illegal business secretly carried on by their testator, and for which, if resulting from a lawful business, an account would have been decreed. In this case the vice-chancellor (pp. 259, 260) repudiates *Brooks* v. *Martin* together with a mass of other cases, some of doubtful others of unquestionable soundness, and falls into the opposite error of refusing an account where it should have been decreed.

In *Wilson* v. *Gregory*, Beasley, C. J., correctly interprets *Sharp* v. *Taylor* and *Brooks* v. *Martin* as holding that a partner in a lawful firm may enforce an accounting of profits from an illegal business, and considers that Lord Cottenham pushed the doctrine further than previous cases would warrant, (his attention was not called to the English pawnbroker cases,) and he considered that Lord Cottenham's views were "signally enforced, if not considerably transcended, in *Brooks* v. *Martin*." This doctrine is energetically criticized, although he fails to distinguish between an unexecuted illegal agreement, the executory provisions of which the court is asked to enforce, and the completed illegal transactions under such agreement, the fruits of which are in the hands of one of the parties to it.

In *Craft* v. *McConoughy*, 79 Ill. 346, (1785,) a party to an illegal agreement for partnership in controlling the grain trade sued for an account of profits. "It was insisted," the court say, "that even if the contract was contrary to public policy, as it has been executed, a court of equity will require an account. The rule is, however, well settled in this state that a court of equity will not lend its aid in the division of the profits of an illegal transaction between associates." And see *Skeels* v. *Phillips*, 54 Ill. 309; *Tobey* v. *Robinson*, 99 Ill. 222, 232.

In *Lucas* v. *Allen*, 80 Ky. 681, (1883,) *Brooks* v. *Martin* was cited, and an extract from the opinion of the court as to

the doctrine imputed to that case is printed in an early part of our argument.

*King* v. *Winants*, 71 N. C. 469, (1874,) was also a suit between parties *in pari delicto* for account of profits under an illegal agreement for partnership.

The court well says: "Suppose in the case before us the parties had come to a settlement, and the defendant had given to the plaintiff his note for the amount due, could the plaintiff have recovered on the note? *Blythe* v. *Lovingood*, 2 Ired. 20, is express authority that he could not." *Brooks* v. *Martin* was cited, and, after stating it, and considering that the suit was not for an accounting under an original illegal partnership agreement, (a construction which, however, is not made very clear,) the court say:

"It is plain that in that case there could have been an account and settlement without any reference whatever to the original illegal transaction, and the decision is put on that ground. Any other interpretation puts it off by itself. But in our case it is the very illegal contract itself between the parties which we are called upon to examine into, settle up and enforce. * * * Two men enter into a conspiracy to rob on the highway, and they do rob, and while one is holding the traveler, the other rifles his pocket of $1,000, and then refuses to divide, and the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy, and the rencounter, and the treachery. Will a court of justice hear them? No case can be found where a court has allowed itself to be so abused. Now if these robbers had taken the $1,000, and invested it in some legitimate business as partners, and had afterwards sought the aid of the court to settle up that legitimate business, the court would not have gone back to inquire how they first got the money. That would have been a past transaction not necessary to be mentioned in the settlement of the new business. And this illustrates *Brooks* v. *Martin*, so relied on by the plaintiff."

One judge, however, dissented, on the authority of *Brooks* v. *Martin*, which he thought could not be distinguished—as it could not, if it has the meaning against which we contend.

Doubtless, a further examination would discover many more cases where *Brooks* v. *Martin* has been considered, and where, while its true meaning has not always been brought to light, the doctrine imputed to it has been denied to be law. We insist that the case, *as reported*, will bear no such meaning. But even if such construction of its language be possible, even if the spoken words, perhaps unguarded perhaps inexactly reported, will bear the meaning imputed to them, then to that extent they misrepresent the determination of the court and the views of the judge who was its spokesman.

And if we are wrong in this—if this court meant to depart so widely from the ancient way as to lay down a doctrine pronounced by the very judge on whom they rely as an authority for it to be "inconsistent with all principle and contrary to all the decided cases," then we think it clear that the decision was inadvertently made, without due consideration of the authorities it overruled, and the results to which it tended. Our criticisms of its reasoning, on such a construction of it, we have given in our comments on *Sharp* v. *Taylor*. That reasoning would make it impossible for the circuit court to refuse to entertain such a bill as that in *Everet* v. *Williams* for an accounting between a partnership of highwaymen. Should at any time the temptation of the enormous profits to be made by wrecking a railway in his charge overpower the virtue of a federal or state judge, and result in a secret partnership between him and his receiver, and the enterprise should succeed, and the judge's share of the profit be in the receiver's hands, and the judge should sue for an accounting and division, on the authority of *Brooks* v. *Martin*, the doctrine imputed to that case would clearly sustain his suit, and no answer could be made to it—at least, in any circuit court of the United States. A decision which necessarily involves such results cannot represent the mature consideration of this court. If it does not mean what it is so commonly

(but, as we think, erroneously) understood to mean, it ought to be explained. If it has the meaning against which we contend, it is clearly ill-considered and erroneous, and should be overruled.

## VII.

### The Case of Planters' Bank *v.* Union Bank.

A single other decision of this court, *Planters' Bank* v. *Union Bank*, 16 Wall. 483, following *Brooks* v. *Martin*, remains to be considered.

This case, also, rightly understood, is in entire harmony with our position that while money which is the fruit of illegal transactions under an illegal contract may come under the operation of a prior lawful contract between the parties to the illegal agreement, or may be the subject-matter or may enter into the consideration of subsequent lawful contracts between the parties to the illegal agreement (or either of them) and third persons, or with each other, it does not follow from this, nor is it the law, that a party to an illegal agreement can, *in an action on the illegal agreement*, recover from the other the fruits of unlawful transactions under the agreement.

The facts in the case were these:

During the rebellion, the Union Bank of New Orleans was the correspondent of the Planters' Bank of Natchez, apparently under a contract of general agency, such a subsists between banks in smaller towns or cities and their correspondents in the large financial centres, and embracing within its scope the collection and sale of notes, drafts, bonds, coupons and other securities transmitted by the principal to the agent for sale or collection, and the crediting and remitting of the proceeds in general account, or, if specially directed, remitting the proceeds of any particular transaction when completed.

In this state of the relations between the banks, a large balance accumulated in favor of the Planters', and stood to

its credit on the books of the Union, and in the account rendered by the latter to the former. This balance was made up of proceeds of collections and sales of securities, and, *inter alia*, of the proceeds of the sales of confederate bonds. One question in the case was upon the liability of the Union bank to account for the proceeds of the sales of these bonds.

It was held that, the action not being to enforce an illegal contract, but merely to recover the proceeds of illegal transactions, and the plaintiff not requiring the aid of any illegal transaction, the plaintiff should recover. The court say: "It is enough that the defendants have in hand a thing of value belonging to them," (plaintiff.) "Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been accomplished, the money or price of it may be a legal consideration between the parties for a promise express or implied, and the court will not unravel the transaction to discover its origin,"—that is the origin of the money, not of the promise.

Here it is clear that the court disclaimed any right of a party to an illegal agreement to recover the fruits of it from the other, in an action *on the agreement itself*. Such right of recovery must be founded on some collateral contract, (in itself free from illegality,) of which the fruit of the illegal agreement may form the subject-matter or may *enter into* the consideration. And, hence, the opinion is a correct exposition of the law, and in accordance with the position we have all along maintained.

But the case is cited against us as authority for the position that when one person assumes to appoint another as his agent to do an illegal act, the money acquired by that act, in the agent's hands, may be recovered by the assumed principal,—as where two parties make an agreement that one shall receive lottery tickets, or counterfeit money, to sell for the other and account for the proceeds, or munitions of war to be sold to the public enemy.

Now, as agency is a contract, and the rights and duties of the parties to each other rest on the contract, and as a contract to do a thing which the law forbids to be done is itself illegal, it is the first condition of a contract of agency, the indispensable prerequisite to the existence of the relation of principal and agent, that the contract shall be lawful,—that the contract shall not be upon an illegal consideration or for an unlawful purpose. If the thing agreed to be done by the assumed agent—the purpose for which he is appointed agent —is illegal, then the agreement is utterly void, and no agency is constituted. *U. S.* v. *Grossmayer*, 9 Wall. 72.

Now, in the case of munitions of war to be sold to the public enemy, certainly after the assumed agent had entered on the business of selling them, and had either made advances on them, or incurred expense in the business, and the goods had been captured or lost, he could not recover from his employer his expenses or advances, on any previous promise implied or expressed; for the consideration of any such promise, being illegal, would not support an express promise, nor, for the same reason, could any be implied. In a case of an illegality much less obnoxious—an agency to to gamble in grain—this court so held, in *Irwin* v. *Williar*, 110 U. S. 499, 510. And this must be on the ground that there was no contract of agency, for, if there were, and the advances were made or expenses incurred in acts within the scope of it, a promise of repayment would be implied, even if none were expressed in the contract.

But if the assumed agent could not recover from his employer if the adventure failed, on what ground can the employer recover the proceeds from the assumed agent, if it succeeds? Is the employer's claim for the proceeds of goods sold more meritorious than that of the assumed agent for services and advances? Or does the legality of a contract depend on the prosperous issue of the dealings in execution of it?

The employer's claim must rest on one of two grounds, viz.: (1) His right under the contract, or (2) His right as owner of the property sold.

Bnt he can assert no contract rights, for there is no contract. There is no contract when the enterprise fails and the agent sues—nor indeed would there be any if the enterprise succeeded, and the assumed agent, not having received the proceeds, sues the employer for services or advances. *Norris* v. *Tool Co., supra.*

Can he recover as owner of the property sold? This assumes that his title to the proceeds is an incident of his title to the property, and of course his right to recover the proceeds can be no greater than would be his right to recover the property if not sold.

But the only suit in which he could reclaim the goods would be a suit brought *before the illegal purpose was carried out.* *Taylor* v. *Bowers*, 1 Q. B. Div. 291, 295, 300; *Thomas* v. *City of Richmond*, 12 Wall, 349; *Spring Co.* v. *Knowlton*, 103 U. S. 49. Certainly, if the munitions had been delivered under an illegal agreement of sale between citizens of the United States, for the purpose of being furnished to its enemies, the seller, as he could not have recovered the price, so he could not have recovered the goods themselves from the buyer, nor any proceeds in that buyer's hands received on a sale to the enemy. *Thomas* v. *City of Richmond*, 12 Wall. 349, 355.

And where the thing delivered under, and which is the subject of, the illegal agreement of agency for sale, is not a thing capable of lawful use, but such a thing as lottery tickets or counterfeit paper money, the argument based on the original ownership of the employer wholly fails. The law which aims to discourage lotteries and counterfeiting, does not stultify itself so far as to recognize those things as "property" which can become the subject of rights as between individuals, (though lottery tickets may, perhaps, be

the subject of larceny, lest in aiming to discourage gambling the law should encourage thieving,) nor does it concede to them any value. No court would entertain an action of replevin or trover for lottery tickets (where lotteries were illegal) or for counterfeit money. "Such property is, so to speak, outlawed." *Spalding* v. *Preston*, 21 Vt. 9, 15.

And where one person employs another to make and utter counterfeit money, furnishing him with materials and implements for its manufacture, it is not easy to see in what respect the former would stand on any different footing in a court of justice, whether his suit were to recover the tools, or the unused material, or the unissued counterfeits or the proceeds of counterfeits issued, or for the conversion of the tools or materials or counterfeits.

And so it is held that one person who has, under an illegal agreement for agency, delivered lottery tickets to another for sale, cannot recover from him unsold tickets or the proceeds of tickets sold, in any suit resting on his ownership of the tickets or on any right arising from the agreement, the delivery, or the sale and receipt of proceeds.

*Lemon* v. *Grosskopf*, 22 Wis. 447.

And so in *Fales* v. *Mayberry*, 2 Gall. 560, a suit against the master of a slave-ship, by the owners, for the proceeds of the cargo in his hands, Story, J., was clear that the suit would not lie. This case is directly opposed to the doctrine imputed to *Brooks* v. *Martin*, inasmuch as Story, J., while holding that, if a case of agency, (as claimed by plaintiff,) the suit would not lie, held it to be really a case of "partnership in an illegal transaction," and that "nothing is better settled than that, as between partners, no action can be sustained on a contract in violation of the laws."

If, then, the case of *Planters' Bank* v. *Union Bank* were a case of a single and isolated transaction, a case where, no previous contract of agency subsisting between them, A em-

ploys B to sell confederate bonds, then delivered to him, and account for the proceeds, it is very clear that A could recover from B neither bonds unsold, nor the proceeds of bonds sold, in any suit resting on A's previous ownership of the bonds or any rights or obligations created by the agreement for agency.

The bonds were issued in aid of what the courts of the United States have always held and must hold to have been a conspiracy to overthrow the government. *Carlisle* v. *United States*, 16 Wall. 147. They could not be lawfully dealt in. Any sale of them was illegal, because giving them currency and credit, and thus directly aiding the enemies of the United States. *Hanauer* v. *Woodruff*, 15 Wall. 439. Nor could they be regarded as property in which the holder could have any rights, or which could be the subject-matter of any contract. Suppose that, during the rebellion, an action of replevin for such bonds had been brought between citizens of loyal states in any court of the United States. It would seem that the court must have refused to entertain it, for no greater aid could have been given to the rebellion than a recognition of such bonds as "property" by the courts of the United States. A thing cannot be property in the sight of the law which is incapable of lawful use or lawful sale.

And because they could not be regarded as property, because they were incapable of being the subjects of lawful traffic, an agreement for an agency in selling them would have been an unlawful agreement, and no obligation whatever would have been imposed on the assumed agent either to return unsold bonds on request, or to account for the proceeds of bonds sold; nor could the employer have recovered either bonds or proceeds in any suit founded on the illegal agreement for agency, or on a claim of ownership of the bonds themselves.

If, then, the transaction between the two banks had been of the character we have supposed—an isolated transaction

of assumed agency for sale of confederate bonds—the judgment of the court must have been for the defendant.

But such was not the character of the transactions. Before they were had or contemplated, a valid contract of agency was created between the parties, large enough in its scope to include transactions in negotiable paper and securities. The Union bank, on receiving these confederate bonds, might have insisted that, though a sale of them might be within the scope of the agency, still it had a right to refuse to sell them because a sale would be illegal. This it did not do. It treated the selling of the bonds as within the agency, sold them, and credited the proceeds, *and thus brought the proceeds of illegal transactions under the operation of a previously made and still subsisting and valid contract of agency.* And, the proceeds having thus been brought under the operation of the contract, the rights and obligations of the parties in respect to them were defined by that contract, and on that contract the plaintiff was entitled to and did sue for those proceeds.

The case is thus directly within the doctrine of the English pawnbroker cases before cited, and is closely analogous in principle to

*Hardy* v. *Stonebraker*, 31 Wis. 640.

Any attempt to rest the case on the ground that the agreement for agency was illegal in its inception, but was legalized by the illegal sale under it, so far at least as to entitle the Planters' Bank to the proceeds—while, confessedly, the Union Bank could not have recovered for advances or expenses in excess of those proceeds—would not only misrepresent the meaning of the court, but would set the case in hostility to principles almost axiomatic, and to all the decided cases, including

*Armstrong* v. *Toler*, 11 Wheat. 258.

## VIII.

### Review of English Cases.

In *Sharp* v. *Taylor*, *Brooks* v. *Martin* and *Planters' Bank* v. *Union Bank*, several English cases are cited and relied on, some of which have been the subject of no little controversy.

In *Faikney* v. *Reynous*, 4 Burr. 2069, (1767) the plaintiff and one R. (who was also a defendant—see 3 Term Rep. 419, note,) had been equal partners for an illegal stock-jobbing adventure, forbidden by the statute 7 Geo. 2, *c.* 8, § 5. The transaction having resulted in a loss, plaintiff, *without any request from R.*, but voluntarily, paid the differences, and afterwards the defendants gave him the bond in suit conditioned for repayment of one-half the sum so paid by him. The plaintiff was *held* entitled to recover.

In *Petrie* v. *Hannay*, 3 Term Rep. 418, (1789,) A., B., and C. were equal partners for an illegal stock-jobbing adventure prohibited by statute 7 Geo. 2, *c.* 8, § 5. The transactions resulted in losses, and the differences were all paid by one Portis, their broker. A. repaid Portis the entire amount paid by him, except one-third, for which B. accepted a bill drawn by A. in favor of Portis. The bill was not paid at maturity, and, A. having died, Portis sued the executors of A. as drawer, and recovered, illegality not being pleaded. A.'s executors paid the judgment, and brought this action against B.,the declaration being for money paid by plaintiffs to defendant's use. They were held entitled to recover.

In *Tenant* v. *Elliott*, 1 Bos. & Pul. 3, (1797,) the defendant, a broker, effected for plaintiff an insurance, which was alleged to be illegal. The vessel having been lost, the underwriters paid the money to defendant, who refused to pay it over to the plaintiff. The plaintiff recovered.

In *Ex parte Bulmer*, 13 Ves, 313, (1807,) before Lord Ers-

kine, Bulmer placed in the hands of one Pratt, a stock-broker, large sums of money to be used in illegal stock transactions. Pratt kept an account with Bulmer, crediting him with the profits and charging him with the losses as they occurred. But while he had in his hands a large sum of Bulmer's money to be so applied, he diverted it wholly to his own use, without employing it at all in those transactions. He became insolvent, and gave Bulmer his notes for the balance due him, which was in part composed of profits on illegal transactions. Bulmer attempted to prove these notes under the commission of bankruptcy against Pratt's estate. The chancellor said: "I shall not permit Bulmer to prove the promissory notes as binding obligations, as the consideration for them is made up, though a very small part, of the fruit of the illegal use of the money lodged with the bankrupt; but I shall allow him to prove all that is admitted by the bankrupt to have been the money put into his hands and diverted to his own use."

As to *Faikney* v. *Reynous*, *Petrie* v. *Hannay*, and *Tenant* v. *Elliott*, it is to be observed that they all proceed on the theory that the illegality in the transactions consisted wholly in making the stock-jobbing contracts and the contract of insurance. The court assumes that it would not have been illegal for the parties to the suit to pay the differences on the stock-jobbing transactions, or for the underwriters to pay the insurance. If the acts of parliament had been construed to make the payments in themselves illegal, as the stock-jobbing act was (in *Cannan* v. *Bryce*, 3 B. & A. 179, 185, (1819.) —cited in *Hanauer* v. *Doane*, 12 Wall. 342, 345,—) construed to make them, then it is clear that such illegal act, with or without a request, could not be a legal consideration for an express or implied promise of repayment.

*Faikney* v. *Reynous* and *Petrie* v. *Hannay* also proceed on the theory that although the payments were in themselves lawful, yet if plaintiff's claim were on an express or implied

promise contained in or founded on the original agreement for the joint adventure, and not on a new agreement on a new consideration after the stock-jobbing transactions, so far as illegal, had been closed, the plaintiff could not have recovered.

On this point see *Booth* v. *Hodgson*, 6 Term Rep. 405, (1795,) "in which judgment," says Lord Erskine, in *Ex parte Bulmer*, "I entirely concur." And see, also, *Root* v. *Stevenson*, 24 Ind. 115; *Lemon* v. *Grosskopf*, 22 Wis. 427.

In the two cases we are considering the decision is placed on the ground of a valid promise, on a new consideration, to repay one who has paid money which another, though under no obligation so to do, might lawfully pay. In *Petrie* v. *Hannay*, although (as observed by Lord Kenyon and in accordance with what is now the law) Portis, having paid the differences voluntarily and without request, could not have recovered from A's executors or B, yet the acceptance of the bill by B was a request by A to pay Portis; and his executors, having made the payment, (there being no countermand of the request,) could recover, and the case is placed on this ground.

In *Tenant* v. *Elliott*, it is quite clear that the payment to the broker was not in pursuance of anything in the agreement employing him or in the insurance agreement. Had such been the case, plaintiff could not have recovered. Moreover, an employment of a broker to effect insurance does not by implication empower him to receive the insurance money in case of loss. The broker's only defense seems to have rested on the theory that he was liable to refund the money to the underwriters.

These cases and the distinctions which they involve are illustrated in *Brown* v. *Tarkington*, 3 Wall. 377. If the note in that case had been made for money lent or expended on request of the bank after it had closed its business, and for use in the meritorious purpose of redeeming its bills, it would seem to have been free from any illegality.

And in *Lemon* v. *Grosskopf*, 22 Wis. 427, if the original employment had provided that one agent for the sale of lottery tickets should pay over to the other, for the principal's use, the proceeds of sales, the principal could not have recovered them from the latter any more than he could the proceeds of tickets sold by the latter.

*Petrie* v. *Hannay* and *Tenant* v. *Elliott* are therefore in full accordance with the position we have all along maintained.

The same would be true of *Faikney* v. *Reynous*, if, after the losses had been incurred, R. had requested Faikney to pay them. But the decision (regarding, as it does, the case as if standing, not on a bond, but on a parol express promise) is open to criticism, not on any question of illegality, but because, Faikney's payment being wholly voluntary and without request, the law would not—as the court concedes—imply a promise of repayment. The court, however, in accordance with Lord Mansfield's view of moral obligation, (see *Pillans* v. *Van Mierop*, 3 Burr. 1633,) holds that such a voluntary payment for another, though it would not raise an implied *assumpsit*, would support a subsequent express promise. This doctrine at one time had considerable currency, —see *Lee* v. *Muggeridge*, 5 Taunt. 36, (1813)—and probably induced Chief Justice Marshall's observations on this case in *Armstrong* v. *Toler*, 11 Wheat. 258, 273: "A subsequent express promise is, undoubtedly, equivalent to a previous request." But this doctrine has been long since abandoned as unsound. *Eastwood* v. *Kenyon*, 11 Ad. & El. 438; Met. on Cont. 184; Pollock, Cont. 157–9; 1 Pars. Cont. *432. We are not aware that the precise question has ever been raised or expressly decided in this court; but we have no doubt that regarding *Faikney* v. *Reynous* as a case on a simple contract, and irrespective of any question of illegality, this court would now hold the *ratio decidendi* of that case not to be law.

As to *Ex parte Bulmer*, it will be observed that so far as it allowed a recovery, it proceeded in *disaffirmance* of the illegal agreement for agency. Bulmer was not allowed to recover for any money actually used in stock-jobbing *nor for any profits in Pratt's hands.* This part of the decision holds just the reverse of the doctrine imputed to *Planters' Bank* v. *Union Bank*, and shows that the court in that case, citing *Ex parte Bulmer* as authority, did not intend to assert a doctrine in direct opposition to it.

That part of the decision which proceeds on the ground of disaffirmance, while not material here, may be tested by the cases in this court on that subject already cited, and by *Sampson* v. *Shaw*, 101 Mass. 145, and *Perkins* v. *Savage*, 15 Wend. 412; *Raymond* v. *Leavitt*, 46 Mich. 447.

The case of *Farmer* v. *Russell* seems to invite the criticism that the receipt of the money by defendant was upon a consideration in itself illegal and in furtherance of the illegal agreement for sale and delivery of the halfpence. The consideration of the payment of the money to the plaintiff was the delivery of counterfeit halfpence to the buyer in furtherance of an illegal agreement for sale. This delivery was an unlawful act, and could not form the consideration of a promise express or implied. True, the carrier is assumed to have been an innocent party. But though an agreement on an illegal consideration may sometimes perhaps be treated as valid *in favor* of the less guilty party, as in case of oppression, or in favor of a party who has entered into it on false representations (of fact) showing it to be legal, and who therefore may not be *in delicto* at all, (*Sykes* v. *Beadon*, 11 Ch. Div. 170, 193, 197,) it is believed to be well settled that the guilty party cannot found rights on the agreement as against such innocent or less guilty party, any more than against one *in pari delicto.* Nor is any reason apparent why he should. In favor of an innocent or oppressed party to an illegal agreement, the policy of the law may relax the rule that an act

prohibited by law cannot be a legal consideration for a promise, but why should that rule be relaxed in favor of a guilty party? Here the buyer and seller having made the illegal contract of sale, the plaintiff, in furtherance and execution of that agreement, procures to be done by defendant the illegal act of delivering the halfpence, in which act the buyer actively participates. It is not easy to see how either buyer or seller could assert any rights under any express or implied contract based on such a transaction, or why such a case should be an exception to the rule that "no suit can be maintained upon an unlawful act" by the guilty party.

*Cannan* v. *Bryce*, 3 B. & A. 179.

The case is distinguishable from the English pawnbroker cases, for here there was (so far as plaintiff was concerned) no originally legal contract of agency, under the operation of which the proceeds of illegal transactions might be brought. Plaintiff's employment of defendant was an illegal act on his part, and was an illegal consideration for any express or implied contract of agency. The employment was for an illegal purpose, and no lawful contract of agency was created.

On these grounds we conceive that *Farmer* v. *Russell* is open to criticism. But since it was decided on the theory of a new contract on a new consideration, it does not, whether right or wrong in its application of the theory, go to show that a recovery can be had on an illegal agreement.

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The case of *McBlair* v. *Gibbes*, 17 How. 232, is also cited in *Planters' Bank* v. *Union Bank*. But in that case, in 1829, long after Mexico had established her independence, one Goodwin, in consideration of the release of a subsisting debt, assigned to one Oliver his claim to reimbursement from Gen. Mina, or from the Mexican government, for money furnished

under an illegal agreement, made in 1816, in aid of military operations against Spain by Mexico in her struggle for independence. This assignment was certainly on a new and valid consideration (the release of a lawful debt,) and was in furtherance of no unlawful purpose, for it was not unlawful (though not obligatory) for Gen. Mina or for Mexico to repay the money thus advanced. It was like the case of the assignment (held good in equity) of any other mere expectancy, as that of an heir-at-law, or of the interest a person may take under the will of a person then living, as to which see 1 Lead. Cas. in Eq. (4th Am. Ed.) part 2, p. 813; 2 Id. part 2, p. 1560.

That Mr. Justice Nelson, in *McBlair* v. *Gibbes*, did not consider that he was giving countenance to the doctrine against which we contend is apparent from his opinion in *Perkins* v. *Savage*, 15 Wend. 412. And see *Belding* v. *Pitkin*, 2 Caines, 147*a*.

Additional English cases involving the same questions with those we have discussed are

*Mitchell* v. *Cockburne*, 2 H. Bl. 379, (1794.)
*Steers* v. *Lashley*, 6 Term Rep. 61, (1794.)
*Booth* v. *Hodgson*, Id. 405, (1795.)
*Brown* v. *Turner*, 7 Term Rep. 630, (1798.)
*Aubert* v. *Maze*, 2 Bos. & Pul. 371, (1801.)
*De Begins* v. *Armistead*, 10 Bing. 107, (1833.)

All of these are in full accord with the rules for which we contend.

## SUMMARY OF THE ARGUMENT.

We submit that the following conclusions are established:

I.

The agreement stated in the bill, if it was ever made, was, in its consideration and its purpose, illegal and against public policy, because in itself a breach of plaintiff's duty as receiver, and because directly tending to the commission of other breaches of trust and frauds by the plaintiff upon his *cestuis que trustent*, and upon the court whose receiver he was.

II.

An agreement which is illegal because in violation of public policy is, as between the parties to it, utterly void, and is not a contract at all, and can give neither party to it any rights whatever as against the other. Nor can either party maintain against the other any suit whatever founded on such agreement.

III.

Any agreement is legal or illegal when made. If legal, its validity will not be impaired by any prior or subsequent illegal agreement between the parties to it, or any unlawful transactions under it.

If illegal, it will not become legalized by any subsequent act or omission of the parties, and clearly not by the commission and profitable completion of the illegal acts for which it provides or to which it tends.

IV.

Hence, although parties to an illegal agreement have, by unlawful transactions under it, acquired money or property, and although such transactions are closed, these circumstances cannot operate to give to one party to such agreement any right to recover from the other, in any suit founded on such agreement, or by any title based on such agreement, any of the fruits of such agreement or such transactions.

V.

The cases of *Brooks* v. *Martin*, 2 Wall. 70, and *Planters' Bank* v. *Union Bank*, 16 Wall. 483, and the cases on which they rely for their support, are in accord with the foregoing propositions and conclusions, and do not constitute any exception thereto. Nor do these cases lend any countenance to the doctrine that an agreement illegal in its inception becomes so far legalized by the acquisition of property by means of unlawful transactions in the execution of it, that one party may maintain a suit, founded on such illegal agreement, to recover such property, or any part of it, from the other party thereto. For—

1. Parties who have made an illegal agreement and committed unlawful acts in execution of it, are not thereby deprived of rights under subsisting legal contracts, nor precluded from making valid contracts with third persons or with each other in respect to property acquired or losses incurred by such parties or either of them in such unlawful transactions.

2. The making of an illegal agreement, and its execution by means of unlawful transactions, do not preclude the property which the parties or either of them may have acquired

from such unlawful transactions from becoming, immediately upon its acquisition, *ipso facto* subject to the provisions of the prior and subsisting lawful contract between the parties.

3. The cases in question are cases where the right to recover property realized from unlawful transactions, or to reimbursement for payment of losses incurred in such transactions, is founded, not on such unlawful transactions or on any illegal agreement, but on a lawful contract, made prior or subsequent to such illegal agreement and transactions.

## VI.

Plaintiff's case cannot be brought within any of the cases in which a recovery has been sustained. He shows no lawful contract at all, nor was he, as receiver, capable of making any which should secure to him anything which he seeks to obtain in this suit. His case, on his own statement of it, rests solely on the illegal agreement alleged in his bill, and therefore has no foundation at all.

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The decree of the circuit court, dismissing the bill was right, and should be affirmed.

WM. M. EVARTS,
GEO. B. YOUNG,
Counsel for Respondents.

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